

Missouri Attorney General's Opinions - 1968

Opinion	Date	Topic	Summary
1-68	May 14	PUBLIC SERVICE COMMISSION. MOTOR VEHICLES.	It is therefore the opinion of this office that: (a) After an operator of a freight-carrying motor vehicle claiming the exemption from Public Service Commission regulation provided by Section 390.030 (8), RSMo, is apprehended with a gross weight in excess of six thousand pounds, he may remove the excess weight and proceed without being in violation of Section 301.070, RSMo, for such continued travel. Although he is liable to prosecution for having operated an improperly licensed vehicle, the exemption of the vehicle under Section 390.030 is not lost by reason of an isolated instance of operating a freight-carrying motor vehicle with a gross weight of more than six thousand pounds. (b) The licensing and registration of a commercial motor vehicle may be changed from time to time to coincide with the use to which it is intended to be put. An owner having no further use for a license authorizing a gross weight of twelve thousand pounds may relinquish it and secure a license authorizing a gross weight not in excess of six thousand pounds.
2-68	Dec 18		Opinion letter to the Honorable Hubert L. Davidson
7-68			Withdrawn
17-68	Jan 25	PROSECUTING ATTORNEYS. SALARIES.	Since the assessed valuation of DeKalb County was determined to be more than \$20,000,000 by the State Tax Commission in its complete report dated December 31, 1966, the Prosecuting Attorney of DeKalb County is entitled to the compensation authorized by Section 56.291, RSMo Cum. Supp. 1965, for counties with an assessed valuation of more than \$20,000,000 for services performed on or after January 1, 1967.
22-68			Withdrawn
24-68	Jan 23	FOURTH CLASS CITIES. TRAFFIC OFFENSES. CITY ORDINANCES. COMPLAINTS AND INFORMATIONS.	(1) Warrant may be issued on a complaint without information in fourth class city unless offense is traffic offense. (2) Warrant cannot be issued for traffic offense without information in fourth class city. (3) Not necessary for city attorney in fourth class city be present in court in absence of an ordinance.
36-68	Jan 18	BRIDGES. ROADS. ROAD DISTRICTS. COUNTIES. TAXATION.	Tax monies raised under Section 137.555, RSMo 1959, can only be spent for use on county roads and bridges, but may not be spent on bridges within a special road district. Expenditure of these funds is limited to those purposes specified by statute.

39-68	Apr 18	FARMERS MUTUAL INSURANCE COMPANIES. INSURANCE.	The intent of the legislature expressed in Section 380.490, RSMo 1959, is to limit the sale of fire and lightning insurance by Farmers' Mutual Companies to ". . . counties in which they are organized, and in adjoining counties and in counties of which a county line of said county is not more than one mile distant from the county line in which said mutual insurance company is organized." A Farmers Mutual selling fire and lightning insurance in any other county violates such law.
40-68	Jan 29		Opinion letter to the Honorable Thomas W. Shannon
45-68	Apr 2		Opinion letter to the Honorable Frank L. Mickelson
46-68	Apr 30		Opinion letter to the Honorable Carl D. Gum
48-68	Jan 30	REGISTRATION. COUNTY CLERKS. CITY COUNCILS.	When the voters approve registration under Chapter 116, the county clerk should commence the registration processes as soon as is reasonably possible. Under Section 116.050, the county clerk has the discretion to designate the number and places of temporary registration as provided by statute. The city councils determine the precincts. In order to register, the voters must apply for registration at the clerk's office or such places of temporary registration as the clerk may designate.
49-68	Jan 16	PROSECUTING ATTORNEYS. CONFLICT OF INTEREST. NEPOTISM. CONSTITUTIONAL LAW. COUNTY COURT. COUNTY JUDGE.	There is no act of nepotism in the appointing by the prosecuting attorney as his secretary the daughter of a county judge. The act of nepotism arises from the fact that the appointing officer who "names or appoints the employee" is, himself, related to the employee within the prohibited degree defined by statute. Inasmuch as there is no private business action which is involved where a prosecuting attorney appoints as secretary a woman who is the daughter of a county judge, there is no violation of the conflict of interest statutes found in Sections 105.450 to and including 105.495, RSMo Supp. 1965. The "principles of public policy" are not violated by the appointing by a prosecuting attorney as his secretary the daughter of a county judge.
50-68	Feb 22	JAILS. CITIES, TOWNS, AND VILLAGES. COUNTIES. SHERIFFS. COOPERATIVE AGREEMENTS.	A city and a county can jointly erect a common jail. A county can house city prisoners and charge the city therefor. The governing body of a county or the sheriff can contract with a town to use the town's jail.
55-68	Feb 8		Opinion letter to the Honorable Dan Bollow
56-68	Apr 18	ROADS AND BRIDGES.	Contract for seal coating state highways with asphalt not subject to

		STATE HIGHWAY DEPARTMENT. PREVAILING WAGE LAW.	Prevailing Wage Law. Contract for application of layer of asphalt and aggregate three-eighths of inch thick subject to Prevailing Wage Law.
57-68	June 18	AUDITS. COUNTY TREASURER. AUDITOR. COUNTY AUDITOR. COUNTIES.	The accounts of the county treasurer of a second class county upon his retirement cannot be singled out for audit under either Section 29.230, RSMo Supp. 1967, or Section 50.055, RSMo 1959. Such audit can be made only under Section 55.160, RSMo 1959. An independent certified public accountant cannot be hired to audit only the accounts of the county treasurer, but can be hired to audit all the accounts of the county at a maximum cost of five thousand dollars under Section 50.055.
58-68	June 18	LABOR. WOMEN. HOURS OF LABOR. FEMALE EMPLOYEES.	Female employee of bank covered by maximum hours of female employment law.
59-68			Withdrawn
62-68	Feb 6	CIRCUIT CLERKS. COUNTY RECORDER. COUNTY ASSESSOR.	Circuit clerk recorder in third class county not required under Section 137.117 to notify county assessor of court decrees in quiet title suits.
63-68	Apr 30		Opinion letter to the Honorable Raymond Howard
66-68	Sept 12	STATE EMPLOYEES' RETIREMENT SYSTEM. LEGISLATURE. RETIREMENT.	Increase in monthly retirement benefits as provided for in Senate Bill No. 360 of the 74th General Assembly, Section 104.390, RSMo Cum. Supp., 1967, is applicable to prior terms of office, served by present and former members of the legislature who are members of the state retirement system and eligible for future retirement, in computing the minimum retirement annuity of such members.
67-68	Feb 13	AGRICULTURE DEPARTMENT. HEALTH-BOARD OF STATUTORY CONSTRUCTION. MEAT INSPECTION. SLAUGHTERHOUSES.	The specific provisions of SB No. 77, 74th General Assembly, as to sanitation in slaughterhouses must be regarded as an exception to, or qualification of, the general provision of Chapter 196, RSMo 1959, and that by the enactment of SB 77 the legislature intended to place in the Department of Agriculture exclusive jurisdiction to prescribe rules and regulations with respect to sanitary practices in all commercial plants at which livestock or poultry are slaughtered, or at which meat or meat products are processed for human consumption, and did not intend to subject those who are so regulated to duplicate supervision by the Division of Health.
68-68			Withdrawn
73-68	Aug 1	CIVIL DEFENSE. FIRE PROTECTION	The Missouri Civil Defense Act (Chapter 44 RSMo.) envisions autonomous local civil defense organization in those political

		DISTRICTS. COUNTIES.	subdivisions defined by the law. Therefore, the county Civil Defense Agency has duties and responsibilities only within the areas of the county lying outside any of the statutorily defined political subdivisions having their own local organization for disaster planning.
74-68	June 24		Opinion letter to the Honorable Elmer J. Meyer
76-68	Oct 1	JUVENILES. JUVENILE OFFICER. SHERIFFS.	It is the duty of the sheriff, if he is convinced that a person in his custody is a juvenile, to report the matter directly to the juvenile court or to the juvenile officer together with all the information he has obtained, and this relieves the sheriff of any further duty insofar as this juvenile is concerned.
78-68	June 17		Opinion letter to Honorable Lem T. Jones, Jr.
80-68	Jan 23	SCHOOL DISTRICTS. SENATE BILL NO. 166. CONSOLIDATION ELECTIONS. BOUNDARY CHANGES.	Senate Bill No. 166 of the 74th General Assembly does not prevent existing school districts from changing their boundaries under the provisions of Section 162.431, RSMo Supp. 1965.
81-68	May 13		Opinion letter to the Honorable Joe J. Taylor
82-68	Oct 9	PURCHASING AGENT. STATE HIGHWAY COMMISSION. STATE PARK BOARD. STATE CONSERVATION COMMISSION.	1. The State Purchasing Agent Law does not apply to purchases made by the University of Missouri. 2. The State Purchasing Agent Law applies to purchases made by departments including state colleges from non-appropriated funds. 3. The State Purchasing Agent Law does not apply to purchases made by a department under statutes now in effect or which may be enacted in the future giving a department specific authority to contract or purchase directly from a seller. 4. The State Purchasing Agent Law does not apply to leases or purchases of land by the State Conservation Commission, the State Highway Commission or the State Park Board.
83-68	Aug 20		Opinion letter to the Honorable George W. Parker
85-68			Withdrawn
88-68	June 25	PROBATE COURT. MENTAL ILLNESS.	The Probate Court of Scott County must grant a reexamination on a petition for release from commitment from the State Hospital in Fulton when the petition is filed by one found to be mentally ill by the Probate Court of Scott County under Section 202.807, RSMo 1959.
91-68	Feb 6	PUBLIC WATER SUPPLY	Public Water Supply District No. 1 in St. Louis County, including only

		DISTRICTS. WATER CODES. ST. LOUIS COUNTY.	unincorporated territories of the county, organized under Sections 247.010 to 247.220, RSMo 1959, can set up plumbing code regulations which are incident and necessary to the operation of the water district. However, such regulations cannot abrogate or contradict any of the provisions of the existing county plumbing code which has been adopted by the St. Louis County Council pursuant to the Constitutional Charter of St. Louis County and Sections 341.090 to 341.220, RSMo 1959.
92-68	Feb 22	ANNEXATION. THIRD CLASS CITIES. COUNTY LIBRARY DISTRICT. PART OF LIBRARY DISTRICT OF ANNEXING CITY.	It is the opinion of this office that territory annexed to a third class city which maintains a free public library supported by taxation pursuant to annexation proceedings pending on October 13, 1965, ceases to be a part of a county library district in which such territory was located prior to such annexation and becomes part of the municipal library district.
95-68	May 14	COUNTY AUDITOR. COUNTY COURT. COUNTY WARRANTS.	The approval of the county auditor is necessary before the county court of a second class county can order payment of a claim against the county out of the county treasury and issue a warrant for such payment, and the county court has the further power to determine whether such a claim shall be paid.
97-68	Feb 6	SHERIFFS. DEPUTIES.	The requirements of Section 57.220, RSMo, requiring that the number of deputy sheriffs in a second class county be not less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county, are met by the appointment of a chief deputy, five "full-time" deputies and four "half- time" deputies in a second class county with a population of 42,020.
99-68			Withdrawn
100-68	Jan 29		Opinion letter to the Honorable J. Anthony Dill
101-68	Jan 11	COMMISSIONER OF FINANCE. BANK APPLICATIONS.	The Commissioner of Finance may process first either the application first received or the application first completed. He may exercise his discretion as to which will be processed first without prejudice to either party.
104-68	Mar 19	COMPATIBILITY OF OFFICES. CORONERS. DEPUTY SHERIFFS. SHERIFFS.	The same individual cannot serve in the dual capacity of coroner and deputy sheriff because the two offices are incompatible.
105-68	Oct 9	COURT REPORTER. JUVENILE COURT. AUDITS.	The clerk of the juvenile court should tax as cost the five dollar fee provided for by Section 485.120, RSMo 1959, when the juvenile court appoints an official court reporter. The five dollar fee must be

		COSTS. FEES.	paid by the clerk into the county or city treasury and the court reporter is not entitled to same.
108-68	Dec 19	STATE UNIVERSITY. POLICE OFFICERS. SHERIFF. ARREST.	City police officers, sheriff, and state highway patrol have jurisdiction over crimes committed on state university property.
110-68	Mar 11		Opinion letter to the Honorable Jerry Graves
111-68	July 1	INSURANCE.	There is nothing to prohibit a fire insurance company from switching from maintenance of its own public rating record to one that is maintained by an actuarial bureau if approval of the superintendent of insurance is obtained as prescribed by statute when the effect of said switching is to increase the fire insurance premium rates.
115-68			Withdrawn
116-68	Mar 19	CREDIT UNIONS. USURY.	The "one percent a month on unpaid balances" interest rate limitation as expressed in Section 370.300, RSMo 1959, is an exception to the general usury statute. The interest rate limitations of Section 408.030, RSMo 1959, and Section 408.100, RSMo 1959, do not apply to credit union loans and credit unions may legally charge up to "* * * one percent a month on unpaid balances; provided, however, that a minimum interest charge not exceeding twenty-five cents per month shall be allowable in all cases."
119-68	Jan 9	MOTORCYCLE. HELMETS. DRIVERS LICENSE.	Points assessed for failure to wear helmet.
121-68			Withdrawn
125-68	May 28	SCHOOLS. JUNIOR COLLEGE DISTRICTS.	1. The requirements of Section 178.810, RSMo Supp. 1967, relating to organization elections of junior college districts are met by giving notice by publication in any newspaper of general circulation in each county at the time and in the manner required by law. 2. The publisher's affidavit of publication of notice of the election is sufficient if it conforms to the requirements of Section 493.060 RSMo. There is no requirement that this affidavit be produced except as may be necessary under the circumstances to provide "sufficient evidence of the publication." 3. The recording by the State Board of Education of the copy of the order declaring the junior college district organized pursuant to Section 178.800, RSMo Supp. 1967, is sufficient to constitute notice to the county clerk and other county officials of the legal existence of the district.
127-68	Jan 5		Opinion letter to the Honorable Charles L. Bailey

128-68	Aug 22	MOTOR VEHICLE LICENSES. MOTOR VEHICLES. LICENSES. REGISTRATION.	(1) A change from individual to joint ownership of a motor vehicle or trailer in which the original owner is one of the joint tenants or tenants by the entirety terminates the right to use the registration plate issued for such vehicle and necessitates the purchase of a new registration plate for the motor vehicle or trailer. (2) A change from joint ownership to individual ownership by one of the joint tenants or tenants by the entirety does not invalidate the continued use of the original registration plate or require the purchase of a new registration plate for the motor vehicle or trailer.
130-68	May 9		Opinion letter to the Honorable William J. Esely
132-68	Feb 27	THIRD CLASS CITY. CITIES, TOWNS, VILLAGES. CITY COUNSELOR. MINISTERIAL.	The City Counselor of a third class city is required to be a resident of said city.
133-68	May 2	CRIMINAL COSTS. INDIGENT PERSONS. POOR PERSONS.	(1) The county is not obligated to pay the medical bills of an indigent defendant who sustains injury during the commission of a crime and is hospitalized for said injury; (2) The county court does have authority to make payment of hospital bills of indigent defendants, but the payment may not be taxed as costs in the criminal case; and (3) Hospital bills incurred by an indigent defendant during the commission of the crime may not be taxed as costs in the criminal case.
134-68	Apr 18	SPECIAL BENEFIT. ASSESSMENT ROAD DISTRICTS. BOUNDARIES CANNOT BE EXTENDED OR LESSENERD.	County court of non-township organization county cannot, under provisions of Section 231.010, RSMo 1959, change boundaries of the special benefit assessment road districts of county, organized under Sections 233.170 to 233.315, RSMo 1959, taking territory from first district and adding same to common road district of county, and taking territory from such common road district and adding it to said second district.
135-68	May 21		Opinion letter to the Honorable John P. Ryan
136-68			Withdrawn
137-68	May 13		Opinion letter to the Honorable Bob F. Griffin
141-68	Mar 21	COUNTY HEALTH AND WELFARE PROGRAMS. ECONOMIC OPPORTUNITY.	Counties may expend funds to provide quarters for community action agencies operating under the federal Economic Opportunity Act.
142-68			Withdrawn
146-68			Withdrawn

147-68	May 2	ROADS AND BRIDGES. COUNTY BUDGET.	General county revenue funds may be budgeted and expended for the purchase of road machinery, repair and upkeep of bridges other than on state highways and not in special road districts, and for the construction and maintenance of roads.
148-68			Withdrawn
151-68	May 29	COUNTY HEALTH CENTER. ELECTIONS.	The question of establishment of a county health center may be submitted to the electorate on the day of the August primary election because such election is a "general election" within the meaning of Section 205.010, RSMo 1959.
152-68	Feb 6	FOURTH CLASS CITIES. CITIES, TOWNS AND VILLAGES.	A fourth class city can legally engage in the operation of an intra-city bus system and can make use of surplus city funds if additional revenue would be required.
154-68	May 14	MOTOR VEHICLES. PICKUP TRUCK. NOT EMERGENCY VEHICLE.	Privately owned pickup truck used in responding to calls for emergency service by motorists of stalled or disabled vehicles, which truck has only standard equipment put on at factory, without equipment for hoisting or towing vehicles at roadside, is not a "wrecker" or "tow truck" within meaning of Section 304.022, Paragraph 3, Subparagraph 3, RSMo. 1959.
155-68	Aug 22	CRIMINAL LAW. DEPARTMENT OF CORRECTIONS. SUPREME COURT RULES. PRISONERS. SHERIFFS.	It is the duty of the penitentiary officials to transport a prisoner in their legal custody to and from a hearing in Circuit Court ordered under Supreme Court Rule 27.26. There is no authority for a county to pay a sheriff mileage for transporting the prisoners in this situation.
158-68	Feb 26		Opinion letter to the Honorable Will W. Davis
160-68	July 14	SCHOOLS. SCHOOL DISTRICTS. COUNTY BOARD OF EDUCATION.	Resident of Andrew County who lives in a school district of Nodaway County having territory located in Andrew and Holt Counties, if he meets all other statutory qualifications, is eligible for and qualified to serve, if elected, as a member of the board of education of Andrew County.
161-68			Withdrawn
162-68			Withdrawn
163-68	Mar 26	FIRE PROTECTION DISTRICTS. CLASS ONE COUNTIES. PENSIONS.	Fire protection districts may pension firemen on vote of people. Section 67.200, RSMo Supp. 1967, has no application to Section 321.220, RSMo Supp. 1967.
164-68	Mar 12	INSURANCE.	The National Senior Citizens Benevolent Association is engaging in

		BENEVOLENT ASSOCIATIONS.	the business of insurance in the State of Missouri. The Articles of Agreement and the Contributing Death Benefit Certificate clearly show that the purpose of this association is to provide insurance for its members in fact, if not in name.
165-68	Mar 14		Opinion letter to the Honorable Robert D. Scharz
166-68	Jan 23	SHOPLIFTING. CRIMINAL LAW. ARREST. CITIZENS ARREST. WARRANTS.	Private citizen may arrest without warrant for felony or petty larceny committed in his presence.
169-68	Mar 26	AGRICULTURE. OLEOMARGARINE. STATUTORY CONSTRUCTION.	Oleomargarine made and manufactured from the ingredients, commodities or combinations thereof, named and set forth in Section 561.770, RSMo 1959, may be sold or offered for sale only when the containers or cartons thereof have printed thereon the word "oleomargarine."
170-68	May 14	COUNTY COURT. COUNTY CLERK. TRANSFER OF FUND.	In county of class three the county court may, on recommendation of the county clerk, transfer funds from the emergency fund to the road and bridge fund, but only for unforeseen emergencies and only on a unanimous vote of the county court.
171-68	Feb 8	NINE HOUR LAW. FEMALE EMPLOYEES- FEMALE LABOR.	Female employees of a business office of a construction company fall within the purview of Section 290.040, RSMo Supp. 1967, prohibiting certain establishments from employing female labor for a longer period than nine hours in one day or fifty-four hours in one week.
172-68	May 28	ECONOMIC POISONS. STATUTORY CONSTRUCTION. DEPARTMENT OF AGRICULTURE.	Incidental differences such as differences in size, shape or color of labels, or differences in trade names or advertising emblems on labels, does not preclude registration of two or more economic poisons as a single product under Section 263.300, RSMo 1959, of the Economic Poisons Law when the writing on such labels is identical with respect to showing that the products have the same formula, are manufactured by the same person, the labeling of which contains the same claims and identifies the products as the same agricultural chemical.
173-68	July 16	SCHOOL DISTRICTS. CHANGE OF BOUNDARY. ST. CHARLES COUNTY. EXTENDING SCHOOL BOUNDARY. BOUNDARIES.	The extension of the municipal boundaries of the City of St. Charles does not automatically extend the boundaries of the St. Charles School District under Section 162.421, RSMo. Supp. 1967, where the territory taken in by the extension of the city is contained within a six-director school district that maintains a high school. The inhabitants of the area annexed by the City of St. Charles may not change the boundaries of the school district by election under

			Subsection 2 of Section 162.421, RSMo. Supp. 1967. However, the voters of the two school districts may change the boundaries between the school districts under the general change-of-boundary statute, Section 162.431, RSMo. Supp. 1967.
174-68	Sept 19	STATE EMPLOYEES' RETIREMENT SYSTEM. LEGISLATURE. RETIREMENT.	A refund of accumulated contributions under Section 104.380, RSMo. Cum. Supp. 1967 for services rendered before October 13, 1967 by a member who retired before October 13, 1967 and who is presently receiving a retirement annuity from the Missouri State Employees' Retirement System, would be in violation of Article I, Section 13 of the Missouri Constitution of 1945.
176-68	Feb 8	CENSUS. POPULATION. COUNTY COURTS. COMPENSATION. SALARIES.	The county court is not authorized to increase the salaries of county officers on the basis of common knowledge of an increase of population in the county since the last decennial census of the United States was taken in 1960. The salaries of such officers must be ascertained solely on the basis of the 1960 decennial census of the United States until January 1, 1971, the date that the 1970 census becomes effective.
177-68	May 2	INSURANCE. TRUE NAME.	"True name" as used in Section 375.012, subsection (2), RSMo Cum. Supp. 1967, means a person's actual and not fictitious name and includes a surname, a first name, and a middle name or initial.
178-68	Sept 17	SCHOOLS. SCHOOL BUILDING. SCHOOL PROPERTY. TENANTS IN COMMON.	A six-director school district may acquire ownership of realty by purchase of an undivided part interest as tenant in common. However, as to that part and during that time which the premises are used for school purposes, exclusive control must be vested in the board of education of the district.
182-68	Feb 23		Opinion letter to the Honorable R. D. "Pete" Rodgers
184-68			Withdrawn
186-68	Feb 29	TRAINING SCHOOLS. JUVENILE COURTS. SENTENCES.	The order of commitment of a delinquent juvenile must be made in accordance with jurisdiction conferred by the legislature. Such an order seeking to limit the period of commitment to the time when the child committed reaches eighteen years of age is invalid and cannot be applied because the controlling statutes require that all such commitments be for an indeterminate period.
187-68	May 23	MOTOR VEHICLES. TRUCKS AND TRACTORS. TRACTORS NOT REQUIRED TO HAVE MUD FLAPS.	A tractor used for pulling a trailer or semi-trailer is not when being driven without the trailer or semi-trailer a truck and, therefore, does not come within the purview of Section 304.265, Mo. Supp., 1967, and is not required to have mud flaps for its rear wheels.
188-68			Withdrawn

189-68	Apr 30		Opinion letter to the Missouri State Board of Accountancy
190-68	May 23	INDUSTRIAL COMMISSION. UNEMPLOYMENT COMPENSATION.	Employee who retires under union contract not eligible for unemployment compensation.
192-68	Aug 22	INDUSTRIAL DEVELOPMENT. COUNTIES.	A county may not condemn property for industrial development.
193-68	Apr 2	RABIES CONTROL. COUNTY HEALTH OFFICER. COUNTY COURT.	In the absence of a county health commissioner, the county court has no power to prepare regulations with regard to dog control for protection against rabies.
195-68			Withdrawn
196-68	May 14	ASSESSORS. TOWNSHIP ASSESSORS. COUNTY COURT. COMPENSATION. FEES, COMPENSATIONS AND SALARIES.	The county court has the duty of paying the statutory fees as set out in Section 65.240, RSMo Supp. 1967, Section 65.245, RSMo 1959, and Section 261.070, RSMo 1959, to the township assessors and that the State Tax Commission has no authority to order the county court to withhold payments of such fees because the Tax Commission believes the property valuations of such assessors are too low.
201-68			Opinion letter to the Honorable Clifford A. Falzone
202-68	Aug 20		Opinion letter to the Honorable C. John Forge, Jr.
203-68			Withdrawn
204-68	May 9		Opinion letter to the Honorable Charles H. Dickey, Jr.
209-68	Dec 17	WATCHMEN. NIGHT WATCHMEN. POLICE OFFICERS. ARREST. BOARD OF POLICE COMMISSIONERS.	It is the opinion of this office that a private watchman licensed by the Board of Police Commissioners of the City of St. Louis has authority limited by the terms of his license to serve and act as a private watchman at certain designated premises within the City of St. Louis only. Such a watchman is not an officer of a municipality in a first class county having a charter form of government and accordingly is not within the provisions of Sections 66.200, RSMo Supp. 1967, or 66.250, RSMo Supp. 1967, relating respectively to the transmission of municipal records and requiring municipal police officers to take training courses. Further, such a watchman has no authority to make an arrest in St. Louis County for a misdemeanor not committed in his presence.
212-68	Mar 14		Opinion letter to the Honorable James C. Kirkpatrick
213-68	Mar 28	SCHOOLS.	1. The sections of the Revised Statutes of Missouri which govern the

		SCHOOL BOARDS. NOMINATIONS. ELECTIONS. ST. LOUIS CITY BOARD OF EDUCATION.	procedure to be used in the handling of nomination petitions of persons who seek election to the Board of Education of the City of St. Louis as independent candidates are Sections 120.180 through 120.220, RSMo 1959, as amended. 2. The petitions are to be filed with the Board of Education for the St. Louis City School District.
214-68	Dec 12	FIRE PROTECTION DISTRICTS. COUNTIES OF FIRST CLASS. BOARD OF DIRECTORS. POWERS OF.	Section 321.220, RSMo Cum. Supp. 1967, granting certain powers to board of directors of fire protection district of first class county empowers directors to require removal of obstructions in streets within district.
218-68	May 14	LICENSES. DRIVER'S LICENSE. CHAUFFEUR'S LICENSE.	An employee of a manufacturing company who regularly drives a company owned pick-up truck, with tools and instruments, with tool chests mounted in the bed of the pick-up truck for performance of his various tasks, and who also carries replacement parts in the back of the pick-up, who makes the rounds of the various machines which he must inspect and service at least once a week regularly drives a commercial motor vehicle of another, that he is acting as a chauffeur as defined in the third definition of Section 302.010 (1), RSMo Supp. 1967, and may be prosecuted for a misdemeanor if he so operates such vehicle without having a proper chauffeur's license.
219-68	Mar 15	SCHOOLS. ELECTIONS.	The names of candidates in an election "in any six-director school district located wholly within a city having a population of more than two hundred thousand and less than seven hundred thousand" shall be listed on voting machines in the order that is prescribed by the appropriate board of election commissioners and that said board may use its discretion in determining what that order shall be.
220-68	May 10	ST. LOUIS CITY CIRCUIT COURT. JURY COMMISSIONER. SHERIFF. JURY ASSEMBLY ROOM. DUTIES OF JURY COMMISSIONER AND SHERIFF REGARDING JURY ASSEMBLY ROOM.	The Circuit Court of the City of St. Louis may not lawfully transfer the jurisdiction, custody and operation of the jury assembly room in the Civil Courts Building in the City of St. Louis from the sheriff to the jury commissioner of said City.
221-68	May 9		Opinion letter to the Honorable Bernard W. Gorman
222-68	Mar 25		Opinion letter to Mr. Donald J. Gralike

224-68	Aug 20		Opinion letter to the Honorable Maurice B. Graham
227-68	Aug 2	RIGHTS OF CITIZENSHIP. FEDERAL DISCHARGE OF PRISONERS. PROBATION, PARDON, AND PAROLEES.	Section 549.111, RSMo Cum. Supp., 1967 does not include within its purview a person who has received his final discharge under federal law.
228-68	Aug 30		Opinion letter to the Honorable Hunter Phillips
235-68	Dec 12	PROSECUTING ATTORNEYS. COUNTY EMPLOYEES. SALARY FOR PROSECUTING ATTORNEYS' STENOGRAPHERS. SALARIES AND FEES. FEES AND SALARIES. EMPLOYEES.	Stenographic and clerical help employed by prosecuting attorneys of third and fourth class counties under the authority of Section 56.245, RSMo Supp. 1967, are employees of the county and not of the prosecuting attorney, and, therefore, such employees are entitled to receive compensation from the county for the period between the date of death of the prosecuting attorney and the date the vacancy of the office was filled by appointment by the Governor during which period there was an acting prosecuting attorney. The person appointed as special prosecutor upon the absence of the prosecutor is not entitled to any remuneration for his services other than that as provided by Section 56.130, RSMo 1959.
236-68	Apr 16		Opinion letter to the Honorable Richard J. Blanck
237-68	Nov 14	CITIES, TOWNS & VILLAGES. BONDS. COOPERATIVE AGREEMENTS. COUNTY BUILDINGS. MUNICIPAL BUILDINGS.	(1) The City of Columbia and Boone County may cooperate in the acquisition or building of an office building to be used jointly for administrative offices; (2) that revenue bonds cannot be used by the City of Columbia or Boone County for the purpose of financing the acquisition or construction of such a building; (3) by a vote of the people general obligation bonds may be issued by the City of Columbia and by Boone County for financing the acquisition or construction of such a building.
238-68	May 2	TAXATION (SALES TAX).	The total amount of the monthly water bills paid by patrons of Public Water Supply District No. 2, of Barton County, are subject to the State Sales Tax.
240-68	Mar 29		Opinion letter to Mr. Hubert Wheeler
242-68	May 14	COMPATIBILITY OF OFFICES. CONFLICT OF INTEREST. DEPUTY SHERIFFS. SHERIFFS. OFFICERS.	An individual employed full time as a deputy sheriff of Buchanan County may serve as a member of the Municipal Excise Board for the City of St. Joseph.
243-68	June 18	TAXATION (INTANGIBLE).	It is the opinion of this office that the intangible tax on Savings and Loan accounts is to be returned, less two per cent for collection, to

			the county treasury of the county in which the home office of the association is located. The taxes are to be distributed to the county and other political subdivisions in which the home office of the association is located in proportion to their respective local rates of levy.
244-68	Apr 23	FEDERAL-STATE AGREEMENTS. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.	Certification of State Application for Participation in Title III Elementary and Secondary Education Act of 1965 as amended by PL 90-247 grants for supplementary education centers and services.
246-68	Sept 12	CONFLICT OF INTEREST. CITY COUNCILMAN. INSURANCE.	A member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo. Cum. Supp. 1967, and Section 106.300, RSMo. 1959, if he furnishes insurance to the city. A city councilman would also violate Section 105.490 and Section 106.300 if he was a member of the Ray County Insurance Agents Association and, as such, participated in the division of the agent's commission made among the members of said association.
250-68	June 18	POLITICAL PARTIES. PARTY COMMITTEE. DATE OF CONGRESSIONAL DISTRICT COMMITTEE MEETING.	Under Section 120.820, RSMo Supp. 1967, pertaining to political parties, Congressional District Committees must meet on "the last Tuesday in August after the primary election."
252-68	May 2	CONSTITUTIONAL CHARTER CITIES. EARNINGS TAX. MUNICIPAL CORPORATION. TAXATION.	The City Charter of Kansas City, Missouri, cannot be amended by a vote of the people so as to authorize the imposition of a one per cent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.
253-68	June 18	AUTOMOBILE DEALERS. AUTOMOBILE INSPECTION. PRIVATE AUTOMOBILE INSPECTION PERMITS. MUNICIPALITIES.	The Superintendent of the Missouri State Highway Patrol may issue private official inspection station permits to automobile dealers, municipalities and other governmental entities having one or more vehicles and/or trailers with a gross weight in excess of 6,000 lbs. They meet the requirement of having the vehicles to be inspected registered in their names by virtue of qualifying for the registration exemption set out in Section 301.250, RSMo 1959.
255-68	Apr 11		Opinion letter to Mr. Joseph M. Rowley
257-68	May 9	CANDIDATE. BALLOTS. ELECTIONS.	The phrase and letters, "(Mr. Econ CDOSA)" cannot appear on the ballot because they are purely descriptive.

258-68	Nov 13		Opinion letter to the Honorable Thomas A. David
261-68	June 14		Opinion letter to the Honorable James E. Spain
262-68			Withdrawn
263-68	May 2	PROSECUTING ATTORNEY. COUNTY BOARD OF EDUCATION. SCHOOLS.	The prosecuting attorney of a third class county is required to represent a county board of education created under Section 162.111, RSMo Cum. Supp. 1967.
264-68	May 14	TAXATION. CITY OF FOURTH CLASS. OCCUPATIONAL TAX. DRIVER'S LICENSE FEES.	A city of the fourth class may not charge an occupational tax on driver's license fees collected by agents of the Department of Revenue who are acting under the authority of Section 136.055, RSMo Cum. Supp. 1967.
266-68	Apr 29	FEDERAL-STATE AGREEMENTS. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965.	Certification of Application by Missouri State Board of Education for federal grant under Title V, Elementary and Secondary Education Act of 1965, PL 89-10.
267-68	Dec 19	DEPARTMENT OF AGRICULTURE. MISSOURI GRAIN WAREHOUSE LAW. GRAIN SAMPLERS.	A private corporation may not be authorized to accept and retain fees for collecting samples for inspection and grading of grain by the Department of Agriculture pursuant to the provisions of the Missouri Grain Warehouse Law. Such samples must be collected by an employee of the state and the fees paid to the Collector of Revenue and deposited in the State Treasury.
269-68	June 18	RECORDER OF DEEDS. TO RECORD INSTRUMENTS WITH PHOTO-COPY DESCRIPTIONS.	An instrument conveying or affecting real estate with photostatic land description taped or stapled thereto meeting requirements of Section 59.330 RSMo. Cum. Supp. 1967 and Section 442.380 RSMo. 1959 as to recordability shall be recorded.
270-68	May 14	TAXATION. COUNTY COURT. EXEMPTIONS FROM TAXES.	Property owned by a corporate unit of the Girl Scouts of America which is used regularly, completely and exclusively for charitable purposes, is exempt from taxation under the constitution and laws of the state.
274-68	May 15	ELECTIONS. CANDIDATES.	A declaration of candidacy which contains a misstatement of the office being sought may not be corrected or amended subsequent to the filing deadline of five p.m. on the last Tuesday in April preceding the primary election.
276-68	Dec 12	TEACHERS. SCHOOLS.	(1) Teachers may join in groups, including unions, for the purpose of making proposals to school boards, but the boards cannot enter into

		SCHOOL BOARDS. UNIONS. LABOR UNIONS. CONTRACTS. PUBLIC CONTRACTS.	binding agreements with such groups; (2) School boards may consider teacher group proposals and are not precluded from acting favorably upon such proposals to the extent that they do not conflict with applicable law or superior regulation; (3) School boards may enter into binding contracts with individual teachers which extend beyond the term of the school board, provided that the individual contract is not for an unreasonable term, in bad faith, fraudulent or in conflict with any statutory provisions or superior regulations; (4) No school board can enter into a contract which involves more than one teacher; (5) The school boards exercise a function of the sovereign and as such cannot delegate and cannot bargain or contract away any sovereign powers or duties.
279-68	Aug 22	POLITICAL SUBDIVISION. PUBLIC WATER SUPPLY DISTRICT. ASSESSED VALUATION. PENSION PLAN FOR EMPLOYEES.	A public water supply district under Chapter 247, RSMo 1959, may employ the pension plan under Section 67.200, RSMo Cum. Supp. 1967, if its assessed valuation is \$40,000,000 or more.
280-68	June 18	REAL ESTATE COMMISSION. LICENSES.	Banking institutions and savings and loan associations which charge fees for making loans or charge discount points for making loans from their own funds are not required to obtain a real estate license under the Missouri Real Estate License Law.
281-68	May 28		Opinion letter to Mr. James Flanagan
283-68	June 20	VOTING. EMPLOYEES.	A Missouri employer is not obligated to allow time off for voting purposes to employees who live and vote in Kansas.
284-68	Nov 13		Opinion letter to the Honorable Hal E. Hunter, Jr.
285-68	Dec 10	MISSOURI NATIONAL GUARD. LABOR ORGANIZATIONS. PUBLIC EMPLOYEES. COLLECTIVE BARGAINING.	Civilian employees of the Missouri National Guard may join labor organizations under the provisions of Section 105.510, but the organization may not enter into a collective bargaining contract binding on the state.
286-68	June 18	INSURANCE. INSURANCE AGENCY LICENSE.	An insurance agency originally licensed after January 1, 1968 is required to pay an annual license fee of \$25 on or before July 1, 1968.
287-68	May 27	ELECTIONS. BALLOTS. NONPARTISAN CANDIDATES.	It is not necessary for county clerks or boards of election commissioners to print a separate ballot when there is only one candidate filed on a nonpartisan or independent ticket in a primary election.

		PRIMARY ELECTIONS.	
288-68	Dec 10		Opinion letter to the Honorable R. Jack Garrett
290-68	Dec 5	AMBULANCES. COUNTY HOSPITALS. HOSPITALS. SPECIAL TAX LEVIES.	A county hospital organized under the provisions of Section 205.160, RSMo et seq., may establish and maintain an ambulance service supported in whole or in part by special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967. Such ambulance service may not be a general service but must be in direct connection with the services rendered county hospital patients.
291-68	Nov 26	COURTS. MAGISTRATES. EXECUTIONS. FEES.	Under Section 483.610, RSMo 1959, magistrate court clerks should charge thirty-five cents for issuing all executions in civil cases.
292-68	Nov 26		Opinion letter to Mr. W.E. Sears
296-68	June 19		Opinion letter to the Honorable W. T. Bollinger
297-68	June 19		Opinion letter to the Honorable J. Anthony Dill
298-68	Nov 15		Opinion letter to the Honorable Les Langsford
299-68	Dec 18		Opinion letter to the Honorable Hubert Wheeler
301-68	July 30	COUNTY ASSESSOR. COUNTY COLLECTOR. TAX ASSESSMENT. TAX COLLECTION.	When more than one person claims ownership of a tract of land and insists on paying the taxes due on the particular tract of land; 1. The assessor should record the names of all claimants in the ownership column of the tax books, and, 2. The collector should receive and issue receipts for all amounts tendered by claimants as payment of the amount due on the particular tract of land.
303-68	Aug 1	ELECTIONS. BONDS.	The respective counties in this state are liable for and are obligated to pay the expense of bond elections for County Hospitals and County Nursing Homes and there is no authority to pay such expenses from the proceeds of bonds sold pursuant to such elections.
306-68			Withdrawn
310-68	June 19		Opinion letter to the Honorable Donald L. Gann
311-68	July 16	ELECTIONS. REGISTRATION RECORDS. COUNTY CLERK.	The County Clerk of Jasper County is charged with and has the duty to retain possession of the registration records of Jasper County at all times, except to deliver, or cause to be delivered, said registration records to the judges of election appointed under and

			by virtue of the general election laws of election, on the day before any primary or general election for which registration is made. There is no statutory requirement that such registration records be delivered by the sheriff.
312-68	July 30	LIQUOR CONTROL. LIQUOR. BONDS. LICENSES.	Applicants for licensure to sell intoxicating liquor by the drink at retail for consumption on the premises pursuant to Section 311.090(2), RSMo 1959, and applicants for licensure to permit the drinking or consumption of intoxicating liquor in, on, or about the premises pursuant to Section 311.480(4), RSMo 1959, are required by law to post bond as required by such sections.
313-68	Nov 21	COLLEGES. RELIGION. SCHOOLS.	State college or university may establish courses, a division or department of religion for the purpose of teaching about religion as distinguished from the teaching of religion. The courses offered, as well as all courses of the institution, both in plan and practice must maintain strict religious neutrality as defined by the courts.
314-68	Aug 2	STATE LIBRARY. FEDERAL-STATE AGREEMENTS. LIBRARY SERVICES AND CONSTRUCTION ACT (20 USC 351).	Review and certification of Amendment (June 12, 1968) to Missouri State Plan under the Library Services and Construction Act, 20 USC 351 as amended by Public Law 89-511.
315-68	June 28	FEDERAL-STATE AGREEMENTS. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965. STATE BOARD OF EDUCATION.	Review and certification of the application by the State Board of Education for Grant (dated June 19, 1968) under Title V of the Elementary and Secondary Education Act of 1965, 20 USC 861, et seq.
317-68	July 16	ELECTION LAWS. ABSENTEE VOTING. HOME REGISTRATION. BOARD OF ELECTION COMMISSIONERS, AUTHORITY REGARDING VOTER QUALIFICATIONS.	Regardless of a registering voter's answers to questions recorded in the files of the Kansas City election board, which reveal information regarding disability or literacy, absentee ballots properly applied for under the provisions of Chapter 112 must be supplied to the potential voter, and must be counted if properly cast.
318-68	Aug 1	LEVEE DISTRICTS. DRAINAGE DISTRICTS. COOPERATION AMONG POLITICAL SUBDIVISIONS.	Section 70.220, RSMo 1959 authorizes drainage and levee districts of the State of Missouri to contract with and enter into agreements with levee districts from other states and also with authorized agencies of the United States.

		INTERSTATE AGREEMENTS.	
319-68	June 28	FEDERAL-STATE AGREEMENTS. ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965. SECONDARY STATE BOARD OF EDUCATION.	Review and certification of State Plan (June 19, 1968) submitted under Title III, Elementary and Secondary Education Act of 1965, PL 89-10 as amended by PL 90-247.
320-68	Sept 3	MINES. DIVISION OF MINE INSPECTION.	The scope of the authority of the Division of Mine Inspection to inspect plants operated in conjunction with the mining of certain minerals is as follows: Lead Ore - All operations prior to shipment to the smelter which includes taking the ore from the ground and reducing it to a concentrate; Clay - All operations at the minesite prior to shipment to the kilns or refractories; Shale - All operations at the minesite prior to shipment to the cement plants or other available markets; Iron Ore - All operations prior to shipment to the steel mills which includes reduction to concentrate and formation of pellets; and Silica Sand - All mining and crushing operations at the minesite.
323-68	Aug 29	ELEMENTARY & SECONDARY EDUCATION ACT OF 1965. FEDERAL GRANTS. STATE BOARD OF EDUCATION.	Review -- certification of State Application for State Plan Preparation and State Advisory Council Activities under Title III, PL 89-10 as amended by PL 90-247.
326-68	Sept 19	FIREARMS. MACHINE GUNS.	The "Spitfire" 45 caliber carbine manufactured by the Spitfire Manufacturing Company, Phoenix Arizona, is a machine gun, possession of which is a felony under provisions of Section 564.590, RSMo, except possession by members of police departments, sheriffs, city marshals or the military or naval forces of this state or the United States in the discharge of their duties.
327-68	Aug 1	SHERIFFS. ELECTIONS. VOTING PLACES.	Neither the sheriff of a third class county nor his deputies are required to be present at each voting place during the entire election day.
328-68	Oct 18	ELECTIONS. LIQUORS. INTOXICATING LIQUORS.	Wholesalers may lawfully make deliveries of liquor and beer to retailers on election days.

		LIQUOR CONTROL.	
330-68	July 17		Opinion letter to the Honorable Jack K. Smith
331-68	Oct 29	AUDITS. STATE AUDITOR. SCHOOLS.	Because of the provisions of Section 174.240, RSMo Supp. 1967 placing the entire administration of the Jasper County Junior College District in the hands of the Missouri Southern State College Regents, an audit by the State Auditor of Missouri Southern State College should include an audit of all expenditures by the Board of Regents in administering the first two years of college under the Jasper County Junior College District.
332-68	Dec 24	WORKMEN'S COMPENSATION. SCHOOLS.	A school district board of directors has authority to elect to become an "employer" under the Workmen's Compensation law and to provide workmen's compensation for its employees and use public funds for such purposes.
333-68	July 30	TAXATION (COUNTY). COUNTY AMBULANCE SERVICE.	A county can submit to the voters under Section 137.065, RSMo 1959, a proposed increase in County Revenue Tax for the establishment and maintenance of the ambulance service authorized by Section 67.300, RSMo Cum. Supp., 1967.
334-68	Aug 20		Opinion letter to the Honorable James S. Corcoran
335-68	July 30	PRIMARY ELECTIONS. FILING FOR ELECTIONS. DEATH OF INCUMBENT.	If a candidate for nomination to an office of which he is an incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election within the provisions of Subsection 1 of Section 120.545, RSMo Cum. Supp., 1967: (1) The five day reopened period for filing provided for in Section 120.545 commences immediately, the first day being the day immediately following the death, withdrawal or disqualification of the incumbent; (2) There are no requirements for notice to be given with regard to the opening of the five day reopened filing period provided for in Section 120.545; (3) The five day reopened filing period shall run on consecutive days unless the last day happens to be a Sunday in which case Sunday shall be excluded and the last day shall be Monday.
336-68	Aug 1	JACKSON COUNTY SPORTS AUTHORITY. TERM OF OFFICE.	The term of Karl Rogers as a commissioner of the Jackson County Sports Complex Authority, expired July 15, 1968; a vacancy exists in such office which should be filled under the provisions of Section 64.930(4) RSMo Supp., 1967; he will continue to serve in such office until his successor has been appointed and qualified.
338-68	Nov 14	TAXATION. CONSTITUTIONAL LAW.	The elimination of the discounts presently allowed under the sales tax act, the state income tax act, and the city earnings tax authorization statutes for the collection of such taxes would not affect the constitutionality of those statutes.

341-68	Nov 14	COUNTIES. DIVISION OF WELFARE. FOOD STAMPS.	A county or City of St. Louis cannot participate in food stamp program until approved by the Federal Department of Agriculture.
344-68	Sept 3		Opinion letter to the Honorable Joe D. Holt
345-68			Withdrawn
347-68	Sept 12	SCHOOLS. IMPEACHMENT. RECALL. QUO WARRANTO.	1. The fact that two directors on the board of a common school district do not send their children to the public schools within the district and are seeking annexation of their district into another district is not sufficient grounds under Section 162.801 RSMo Cum. Supp., 1967, to declare vacancies on the board and consequently, the County Superintendent of Schools has no authority to appoint new directors. 2. Members of the Board of Directors of a common school district do not violate any of their statutory duties as enumerated in Section 162.091 RSMo Cum. Supp., 1967, because of their refusal to send their children to the public school within their district or because of their activity favoring annexation of their district into another district. 3. There are no provisions for the recall or impeachment of members of the board of directors of a common school district. Board members may be removed from office by a quo warranto proceeding.
350-68	Sept 5	ELECTIONS. CANDIDATES. COUNTY TREASURER.	Section 54.040, RSMo 1959, does not prohibit a deputy county clerk of a second class county from being eligible to the office of treasurer of said county when such individual has resigned as deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.
352-68	Oct 29	COUNTY COURTS. ROADS AND BRIDGES.	County court cannot issue tax bills against adjacent property for road improvements.
353-68	Sept 19	PUBLIC RECORDS. RECORDER OF DEEDS. MICROPHOTOGRAPHING AND MICROFILMING OF RECORDS. DUPLICATES. WHEN FILED.	It is the opinion of this office that when a recorder of deeds records all legally recordable documents by making and filing photostatic or photographic copies of said documents as provided by Section 109.120(3), RSMo. Cum. Supp. 1967, one copy of each original document shall be made. When the recorder records documents by making and filing microphotographic or microfilm copies, duplicate copies must be made.
354-68	Dec 19	CONSTITUTIONAL LAW. PHYSICIANS. COMMISSION ON HIGHER EDUCATION. SCHOOLS.	An agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

		MEDICAL SCHOOLS. EDUCATION. RELIGION. CONTRACTS.	
355-68	Dec 4		Opinion letter to the Honorable Thomas D. Graham
356-68	Oct 1	HOSPITALS. BOARD OF HOSPITAL TRUSTEES. HOSPITAL TAX. LEASING HOSPITAL FROM PRIVATE OWNERS.	A hospital board of trustees created by and acting pursuant to Sections 205.160 to 205.340, RSMo 1959, as amended, RSMo. Cum. Supp. 1967, may lease existing hospital facilities from a private organization until a permanent county hospital can be erected. Funds raised by the tax levy authorized by Section 205.200, RSMo. Cum. Supp. 1967, cannot be used to pay the rental on the leased facilities.
359-68	Oct 29	COUNTIES.	County cannot enter into a lease-type agreement for purchase of personal property on payment plan extending ever one year without a vote of the people.
361-68			Withdrawn
363-68	Aug 13	STATE BOARD OF EDUCATION. ELEMENTARY & SECONDARY EDUCATION ACT OF 1965. FEDERAL GRANTS.	Review and certification of Missouri State Department of Education's Application for Program Grants for Migratory Children, FY 1969, Title I, PI, 89-10 as amended by PL 89-750.
370-68	Sept 3		Opinion letter to the Honorable Winston V. Buford
371-68	Sept 19	MOTOR VEHICLES. DRUNK DRIVERS. DRIVING WHILE INTOXICATED.	In prosecutions for driving while intoxicated, Section 564.440, RSMo 1959, prior convictions for driving while intoxicated in other states cannot be considered in assessing punishment.
373-68	Nov 13		Opinion letter to the Honorable J. H. Frappier
375-68	Dec 12	HOSPITALS. HOSPITAL DISTRICTS. AMBULANCE SERVICE.	The Reynolds County Hospital District organized under Chapter 206, RSMo., may provide an ambulance service to the inhabitants of the hospital district as an incident to the operation of the hospital. Such service may only be provided after the hospital is established. The District cannot furnish a general ambulance service provided for in Section 67.300, RSMo Supp. 1967.
380-68	Nov 14	BONDS. INDUSTRIAL DEVELOPMENT. COMPETITIVE BIDS. APPROVAL OF	A city of the 4th class under a lease agreement pursuant to industrial development revenue bond issues under Chapter 100, RSMo Cum. Supp. 1967, need not follow the procedure of competitive bidding for the construction of the proposed facility thereunder, and that under Section 100.200, any purchase options

		INDUSTRIAL PROJECTS BY DIVISION OF COMMERCE AND INDUSTRIAL DEVELOPMENT.	entered into in compliance with the statutes and approved by the Division of Commerce and Industrial Development need not be further approved at the time of their actual exercise.
382-68	Oct 29	OFFICERS. OFFICE OF PROFIT. PROBATE JUDGE. MAGISTRATE.	Probate Judge/ex officio Magistrate may not simultaneously serve as United States Commissioner pursuant to 28 USCA, Section 631.
384-68	Nov 13		Opinion letter to the Honorable Alden S. Lance
385-68	Oct 17	BONDS. ELECTIONS. CONSTITUTIONAL LAW.	A vote on November 5, 1968, by a municipality to issue general obligation bonds, will not pass if more than 60%, but less than 66-2/3% of the vote is favorable, even though on the same date a proposed constitutional amendment to reduce the percentage requirement to 60% for the issuance of such bonds obtains a majority vote.
388-68	Dec 12	MOTOR VEHICLES. LIMITED DRIVING PRIVILEGES.	A court cannot grant a limited hardship privilege where a license has been revoked under the provisions of Section 302.291, RSMo.
392-68	Oct 14		Opinion letter to the Honorable William R. Antoine
395-68	Oct 29	OFFICERS. PUBLIC OFFICERS. COMMITTEEMEN.	One can hold the offices of United States Representative in Congress and party committeeman concurrently.
396-68	Aug 11	ELECTIONS. CHALLENGERS. WATCHERS. POLITICAL PARTIES.	A new political party organized under the provisions of Section 120.140, RSMo et seq. is a political party within the provisions of the statutes relative to the selection of challengers and watchers. There are no statutory provisions for challengers in areas other than Clay County, Jackson County, St. Louis County, Kansas City, and the City of St. Louis in general elections.
397-68	Oct 24		Opinion letter to the Honorable James C. Skaggs
398-68	Dec 5		Opinion letter to the Honorable Bill Crigler
399-68	Nov 26	BANKS. TRUST COMPANIES. SAFE DEPOSIT COMPANIES. WAIVERS. INHERITANCE TAXES.	It is the opinion of this office that a bank or other institution included in Section 145.210, RSMo Supp. 1967, having custody of the will of a decedent shall deliver such will to the Probate Court which has jurisdiction of the estate. No inheritance tax waiver is required to authorize such delivery.
403-68	Oct 17	ELECTIONS.	County courts and boards of election commissioners have authority

		POLITICAL PARTIES. ELECTION JUDGES.	to appoint as election judges only members of the Democratic and Republican parties because such two political parties are the parties which received the largest number of votes and the next largest number of votes at the last general election. The county courts and boards of election commissioners have no authority to select judges from lists submitted to them by the alleged representatives of a third political party.
405-68	Oct 17	ELECTIONS. ABSENTEE VOTING.	An absentee ballot which is mailed to the issuing officer by an individual other than the voter at the request of the voter, is a valid ballot and should be counted if otherwise in compliance with the Absentee Voting Laws.
409-68			Withdrawn
410-68	Dec 5	PODIATRISTS. LICENSES.	It would be a valid exercise of the inherent police power of the state to adopt legislation requiring a reasonable "continuing education" program in the field of podiatry as a condition to annual registration.
411-68	Dec 5	PHYSICIANS. PODIATRY.	It is the opinion of this office that the services of a podiatrist are not "physician's services" as provided in Section 208.152, RSMo. Supp. 1967, providing for benefit payments for medical assistance on behalf of needy persons.
414-68	Oct 31	ELECTIONS. PRESIDENT AND VICE- PRESIDENT. VOTING. "WRITE-IN" VOTES.	Under Sections 111.420 and 111.580, RSMo 1959, write-in votes for president and vice-president which are properly cast must be counted, and do not invalidate a ballot nor any portion thereof.
415-68			Withdrawn
418-68	Oct 31		Opinion letter to the Honorable William C. Batson, Jr.
422-68	Nov 1		Opinion letter to the Honorable Charles B. Adams
434-68	Dec 17		Opinion letter to the Honorable James P. Dalton
439-68	Dec 23		Opinion letter to the Honorable Harold L. Volkmer
447-68	Dec 23	FEDERAL STATE AGREEMENTS. STATE BOARD OF EDUCATION. HIGHER EDUCATION ACT OF 1965.	Review and certification of State Plan for Attracting and Qualifying Teachers to Meet Critical Teacher Shortages under Part B, Subpart 2 of the Education Professions Development Act, Title V Higher Education Act of 1965, as amended by P.L. 90-35.
453-68			Withdrawn

PUBLIC SERVICE COMMISSION:
MOTOR VEHICLES:

It is therefore the opinion of this office that: (a) After an operator of a freight-carrying motor vehicle claiming the exemption from Public Service Commission regulation provided by Section 390.030 (8), RSMo, is apprehended with a gross weight in excess of six thousand pounds, he may remove the excess weight and proceed without being in violation of Section 301.070, RSMo, for such continued travel. Although he is liable to prosecution for having operated an improperly licensed vehicle, the exemption of the vehicle under Section 390.030 is not lost by reason of an isolated instance of operating a freight-carrying motor vehicle with a gross weight of more than six thousand pounds. (b) The licensing and registration of a commercial motor vehicle may be changed from time to time to coincide with the use to which it is intended to be put. An owner having no further use for a license authorizing a gross weight of twelve thousand pounds may relinquish it and secure a license authorizing a gross weight not in excess of six thousand pounds.

OPINION NO. 1

May 14, 1968

Colonel E. I. Hockaday
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri 65101



Dear Colonel Hockaday:

This is in response to your request for an opinion of this office concerning the following issues:

"(2) After an operator claiming the exemption mentioned in Section 390.030 has been apprehended with a gross load in excess of 6,000 pounds he removes the excess load. Can he thereafter proceed without being in violation of Section 301.070 and continue to claim the exemption provided in Section 390.030?

"(3) After an operator claiming the exemption mentioned in Section 390.030 has been apprehended with a gross load in excess of 6,000 pounds he secures a 12,000 pound license for his vehicle. However, in order to continue to claim the exemptions provided under Section 390.030, paragraph 8, he discards the 12,000 pound license on the following day and again secures another 6,000 pound license for his vehicle. May this operator continue to claim the aforementioned exemption even though all of the operation is conducted within a given license year for commercial motor vehicles?"

Colonel E. I. Hockaday

The significance of the "exemption" referred to in your inquiries is that, where it applies, the carrier is not subject to regulation by the Public Service Commission. Section 390.041, provides in part that the Public Service Commission "* * * is hereby vested with power and authority: * * * To license, supervise and regulate every motor carrier in this state; * * * " Exceptions to this rule are, however, enumerated in the next preceeding paragraph, Section 390.030, which states in part:

"The provisions of sections 390.011 to 390.176 shall not apply to:

"(8) Freight-carrying motor vehicles duly registered and licensed in conformity with the provisions of chapter 301, RSMo, for a gross weight of six thousand pounds or less; * * * "
(Except as otherwise noted, all statutory references herein are to the Revised Statutes of Missouri, 1959)

If a vehicle meets the qualifications of the foregoing exception, it is obvious that it does not fall within the regulatory authority of the Public Service Commission. The determinative issue, then, is whether a vehicle found on one occasion to have a gross weight in excess of six thousand pounds thereby loses the benefit of the exemption. More specifically, the issue can be stated as being whether the vehicle in question is "* * * licensed in conformity with the provisions of chapter 301, RSMo, for a gross weight of six thousand pounds or less; * * * " notwithstanding that it is found on one occasion to weigh more.

Turning to chapter 301, the key statute appears to be Section 301.070 which provides for the computation of licensing fees. Subsection 4 provides:

"Fees of commercial motor vehicles, other than passenger-carrying commercial motor vehicles, shall be based on the gross weight of the vehicle or any combination of vehicles and the maximum load to be carried at any one time during the license period."

The "maximum load to be carried" referred to above is a forward looking term which connotes, to a greater or lesser degree, an estimate on the part of the applicant (See Section 301.020 (3)), subject to the final determination by the Director of Revenue contemplated by subsection 5 of Section 301.070, which reads as follows:

"The decision of the director as to the type of motor vehicles and their classifications for the purpose of registration and the computation of fees therefor shall be final and conclusive."

Colonel E. I. Hockaday

Inasmuch as your question (2), supra, apparently contemplates a single instance of a violation of the 6000 pound limitation, it would not seem that such an instance should be held to abrogate the qualification of the vehicle for the Section 390.030 exemption.

Although this point has not been specifically ruled by any appellate court of this state, adequate guidance is provided by judicial opinions in analogous cases for the formulation of this opinion. For example in *State ex rel. Public Service Commission v. Logan* (1967) 411 S. W. 2d 86, the Public Service Commission sought to collect certain statutory penalties from the defendant upon the grounds that he had transported household goods in intrastate commerce for hire without first having received a certificate of authority from the Public Service Commission authorizing such operations. For purposes of the opinion, the allegations of the petition were taken as true and the Court said, 411 S. W. 2d 86, 88:

"One who makes a single isolated movement of property from one point to another in this state on the public highway for hire does not for that reason alone 'engage in the business of a common carrier in intrastate commerce.' He must hold himself out to the general public to engage in the transportation by motor vehicle of property for hire. * * * "

Similarly, in *City of Nevada v. Bastow* (1959) 328 S. W. 2d 45, the Kansas City Court of Appeals considered whether the defendant's truck was liable to a municipal tax where defendant invoked Section 301.340 and claimed such truck was used exclusively outside of the City of Nevada. In ruling this point against defendant, the court regarded as significant the fact that " * * * In the operation of defendant's affairs the truck was regularly, not just occasionally, parked within Nevada when it was empty. * * * " 328 S. W. 2d 45, 48 (Emphasis supplied.) It may be inferred from this statement that an occasional parking of the truck in the city would not have constituted a use within the city.

Furthermore, our Supreme Court has recently had occasion to scrutinize the exemptions accorded by Section 390.030 and concluded that they are to be applied to vehicles and not to the nature of the cargo hauled. *State ex rel. Lee American Freight System, Inc. v. Public Service Commission*, (1966) 411 S. W. 2d 190, 194-195. Hence, it would seem to follow that a vehicle licensed for a gross weight of six thousand pounds or less would not necessarily lose such exemption by virtue of the incidental fact that on one occasion it was loaded so as to exceed such weight.

This is not to say that the carrier and operator of the vehicle would be immune from prosecution for operating an improperly licensed vehicle. Moreover, if the vehicle in question is regularly used for

Colonel E. I. Hockaday

carrying cargo which causes the gross weight to exceed the six thousand pound limitation, the Director of Revenue is fully authorized by Section 301.070 - 5 to decide that the vehicle does not qualify for the less than six thousand classification and to require computation of fees on the basis of a higher gross weight. If such authority were so exercised, the vehicle would no longer qualify for the exemption contemplated by Section 390.030 (8).

With respect to question (3) you assume that a carrier, found to be violating the six thousand pound maximum secures a twelve thousand pound license. Thereafter, and during the same license year, he relinquishes the twelve thousand pound license and secures another six thousand pound license in order to take advantage of the Section 390.030 (8) exemption from Public Service Commission regulation.

Assuming that at the time he reverts to the lesser license " * * * the maximum load to be carried at any one time during the license period." plus the weight of the vehicle does not exceed six thousand pounds, Section 301.070, the carrier would not be prevented from doing so in order to take advantage of the Section 390.030 (8) exemption. Although Section 301.030-3, RSMo Cum. Supp. 1967, requires registration of commercial vehicles on an annual basis, it also permits the issuance of license during the year. Consequently, it is appropriate for an owner of a commercial vehicle to change the registration and licensing of the vehicle at any time when his contemplated use thereof changes. This would include a revision of the licensing to authorize an increased as well as a decreased gross weight.

CONCLUSION

It is therefore the opinion of this office that:

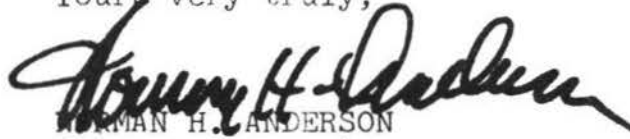
(a) After an operator of a freight-carrying motor vehicle claiming the exemption from Public Service Commission regulation provided by Section 390.030 (8), RSMo, is apprehended with a gross weight in excess of six thousand pounds, he may remove the excess weight and proceed without being in violation of Section 301.070, RSMo, for such continued travel. Although he is liable to prosecution for having operated an improperly licensed vehicle, the exemption of the vehicle under Section 390.030 is not lost by reason of an isolated instance of operating a freight-carrying motor vehicle with a gross weight of more than six thousand pounds.

(b) The licensing and registration of a commercial motor vehicle may be changed from time to time to coincide with the use to which it is intended to be put. An owner having no further use for a license authorizing a gross weight of twelve thousand pounds may relinquish it and secure a license authorizing a gross weight not in excess of six thousand pounds.

Colonel E. I. Hockaday

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

December 18, 1968

Opinion No. 2
Answered by Letter (Wood)



Honorable Hubert L. Davidson
Prosecuting Attorney
Thayer, Missouri

Dear Mr. Davidson:

You have requested an opinion from this office as to whether real property not assessed by the county assessor after the United States Forest Service took an option on such property can be there- after assessed so that the taxes during the period of the option, and thus prior to acquisition of title by the United States, can be collected.

There is a statute providing for the assessment of real property by the assessor which has been omitted "by any means" from assessment in prior years:

"Procedure of assessing real estate omitted from tax books. -- If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax which ought to have been assessed and paid in former years charged thereon." (Section 137.165, RSMo. 1959.)

In light of this section, it is our opinion that the property in question can be placed on the tax books by the assessor.

We are enclosing opinion No. 76 rendered June 25, 1945, to Horace T. Robinson which holds that assessment of omitted real property may be made by the assessor, the county board of equalization or the State Tax Commission.

Honorable Hubert L. Davidson

However, since the land is now owned by the Federal Government the means of collecting the tax are considerably reduced. There are two methods of enforcing payment of real property taxes in this State,

- (1) by sale of the real property, and
- (2) through seizure and sale of personal property of the land owner. (State ex rel Greene County v. City of Springfield, 375 SW2d 84 (Banc, 1964)).

Obviously the land cannot be sold since it is now owned by the Federal Government (27 Am. Jur. 2d Eminent Domain, Section 256, p. 32; State ex rel City of St. Louis v. Baumann, 153 SW2d 31 (Banc, 1941). The lien attaches to the land and survives such ownership should the United States dispose of the property. It simply cannot be enforced through sale of the land while so owned (United States v. Alabama, 313 U.S. 274, 85 L.Ed. 1327, 61 S.Ct. 1011 (1941); 158 A.L.R. 563). Therefore, collection of the tax can only be effected through distraint of personal property of the person or persons who owned the land prior to the date of acquisition of title by the United States, as provided in Section 139.-120 RSMo. 1959. (See St. Louis Provident Association v. Gruner, 199 SW2d 409 (Div. 1, 1947)).

For your information we are enclosing a copy of an earlier opinion rendered by this office to Roy W. McGhee, Jr., dated November 20, 1956, which states the foregoing principles in more detail.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion 59, McGhee, 11-20-56
Opinion 76, Robinson, 6-25-45

PROSECUTING ATTORNEYS: Since the assessed valuation of DeKalb
SALARIES: County was determined to be more than
\$20,000,000 by the State Tax Commission
in its complete report dated December 31, 1966, the Prosecuting
Attorney of DeKalb County is entitled to the compensation
authorized by Section 56.291, RSMo Cum. Supp. 1965, for counties
with an assessed valuation of more than \$20,000,000 for services
performed on or after January 1, 1967.

OPINION NO. 17
NO. 63 (1967)

January 25, 1968

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri 64469



Dear Mr. Paden:

This is in answer to your request for an opinion on the question of when the compensation granted the Prosecuting Attorney of DeKalb County, under Section 56.291, RSMo Cum. Supp. 1965, (for counties with a valuation of more than \$20,000,000) becomes effective inasmuch as the assessed valuation of the county changed from under \$20,000,000 for the year 1965, to over \$20,000,000 for the year 1966.

Section 56.291, RSMo Cum. Supp. 1965, provides:

"The prosecuting attorney in counties of the third and fourth class, in addition to his other duties provided by law, shall submit to the attorney general of the state of Missouri, a written brief summarizing the facts and law of the lower court proceedings had in all criminal cases appealed to the supreme court from the county of his jurisdiction and as compensation shall receive in addition to the compensation provided by law, in third class counties having an assessed valuation of more than forty million dollars, the sum of three thousand two hundred dollars; in third class counties having an assessed valuation of thirty million dollars and less than forty million dollars, the sum of two thousand six hundred dollars; in third class counties having an assessed valuation of twenty million dollars and less than thirty million dollars, the sum of two thousand dollars; * * * to be paid monthly in the same manner as the prosecuting attorney's compensation. * * * "

Honorable Robert B. Paden

The Twenty-first Annual Report of the Missouri State Tax Commission for the year 1966, shows on page 345 that the total assessed valuation for DeKalb County for 1966, was \$20,327, 248. This report of the Commission is dated December 31, 1966. Your question, then, is whether the additional compensation authorized by Section 56.291 because DeKalb County increased its valuation to more than \$20,000,000 becomes effective on January 1, 1966, as of the date the assessed valuation was made for certain taxes in 1966; or, whether the additional compensation becomes effective after December 31, 1966, when the assessed valuation of the county was publicly announced by the State Tax Commission.

It is clear from Section 56.291 that the additional compensation is keyed to the assessed valuation. That is to say, the right to additional compensation is conditioned upon the existence of the assessed valuation of more than \$20,000,000 as a fact. Accordingly, the prosecuting attorney has no enforceable right to additional compensation, and the county has no obligation to pay it before the assessed valuation of the county is ascertained with reasonable certainty.

Section 137.080, RSMo 1959, provides:

"Real estate and tangible personal property shall be assessed annually at the assessment which commences on the first day of January."

In Long vs. City of Independence, 229 S.W. 2d 686, 1.c. 689, the court quoted the foregoing statute and stated:

"* * * The section deals with two matters: The 'official assessments' (the final results of one of the procedures in the taxation process), and that particular procedure itself (the assembling of the data upon which the official assessments are based). See Cooley on Taxation, 4th Ed., Vol. III, Sec. 1044. The General Assembly has enacted many laws outlining the entire taxing process, and prescribing the powers and duties of various officials and boards of the state, county, city and other subdivisions, relative to the assessment, levy and collection of taxes. Chap. 79, Mo.R.S.A. The result of this process, which commences January 1 and is not completed until months later, is the 'official assessment' as to each individual person or property unit."

Honorable Robert B. Paden

The process relating to the assessment, levy and collection of merchants' and manufacturers' taxes pursuant to Chapter 150, RSMo 1959, commences on the first Monday in May of each year when each merchant and manufacturer must furnish the assessor a statement of the greatest amount of goods, wares and merchandise which he may have had on hand at any time between the first Monday in January and the first Monday in April next preceding. This process likewise is not completed until months later. However, with respect to the merchants' tax (Section 150.060) and again with respect to the manufacturers' tax (Section 150.330), the legislature has stated:

" * * * the sum of the valuation of the statements as equalized by the county board of equalization shall be included in and made a part of a total valuation of property taxable for all purposes."

Inasmuch as the legislature has provided that the process for the assessment of such property cannot begin prior to the first Monday in May of each year, it is clear that the legislature did not intend that the additional compensation for prosecuting attorneys authorized by Section 56.291, should begin on January 1 of the year that the assessed valuation is determined.

In Cupples-Hesse Corporation vs. Bannister, 322 S.W. 2d 817, 1.c. 823, the court states:

"We think it important to note that defendant Assessor has the duty of assessing property each year (Section 137.080 RSMo 1949, V.A.M.S.), and that each year's assessment constitutes an independent proceeding and judgment. * * * Each year's tax is a separate transaction and each action relating to each year's tax is a new cause of action. In re Breuer's Income Tax, 354 Mo. 578, 190 S.W. 2d 248; Young Men's Christian Ass'n of St. Louis and St. Louis County v. Sestric, 362 Mo. 551, 242 S.W. 2d 497. * * *"

The decisions of the State Tax Commission are subject to judicial review. However, In Re St. Joseph Lead Company, 352 S.W. 2d 656, 1.c. 664, the court pointed out that:

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" * * * (the circuit court had neither the power nor the authority to fix the valuation of the appellant's property, *Koplar v. State Tax Commission (Mo.)*, 321 S.W. 2d, 1.c. 697; *Drey v. State Tax Commission (Mo.)*, 345 S.W. 2d, 1.c. 238); * * * "

Section 138.440, RSMo Cum. Supp. 1965, provides in part as follows:

- "1. A report of the proceedings and decisions of the state tax commission shall be printed annually.
2. Such report shall contain a complete account of the work of the state tax commission, including its proceedings and decisions while acting as a board of equalization.
3. At least one thousand copies thereof shall be distributed to the members of the general assembly, officers of the state, and to others interested in just, equal and uniform taxation."

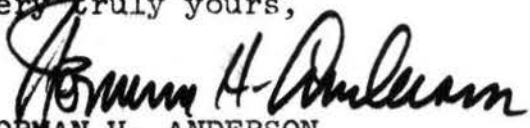
It appears, therefore, that the decision of the State Tax Commission relative to assessed valuation of DeKalb County for the year 1966 was final and conclusive when it was publicly announced in the complete report of the work of the Commission on December 31, 1966.

CONCLUSION

It is the opinion of this office that since the assessed valuation of DeKalb County was determined to be more than \$20,000,000 by the State Tax Commission in its complete report dated December 31, 1966, the Prosecuting Attorney of DeKalb County is entitled to the compensation authorized by Section 56.291, RSMo Cum. Supp. 1965, for counties with an assessed valuation of more than \$20,000,000 for services performed on or after January 1, 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

FOURTH CLASS CITIES:
TRAFFIC OFFENSES:
CITY ORDINANCES:
COMPLAINTS AND INFORMATION:

(1) Warrant may be issued on a complaint without information in fourth class city unless offense is traffic offense. (2) Warrant cannot be issued for traffic offense without information in fourth class city. (3) Not necessary for city attorney in fourth class city be present in court in absence of an ordinance.

OPINION NO. 24
135 (1967)

January 23, 1968

Honorable Jack E. Gant
State Senator, 16th District
9517 East 29th Street
Independence, Missouri 64052



Dear Senator Gant:

This is in answer to your request for an opinion from this office as follows:

"1. When a complaint is signed, wither by a police officer or a private citizen seeking the issuance of a warrant by the police judge of a Fourth class city, is it necessary that the city attorney or special counsel make an investigation and file an information with the judge prior to the issuance of a warrant by the judge?

"2. Is it necessary that the city of the fourth class have a lawyer present to serve as prosecutor whenever the police judge holds court?"

In substance, your first question is whether a warrant may be issued for the arrest of a person accused in a complaint of violating a city ordinance of a fourth class city before investigation is made by the city attorney and an information filed by him.

The practice and procedure in all municipal courts of this state is governed by Supreme Court Rule 37. Under this Rule different procedures are provided for, for prosecuting persons for traffic violations as distinguished from persons violating other municipal ordinances. We will first consider the Rules governing cases other than traffic cases.

Honorable Jack E. Gant

Supreme Court Rule 37.06 provides:

"All municipal ordinance violations shall be prosecuted by information or complaint, whichever is required by law, in the form and manner hereinafter provided."

Under this Rule a person may be prosecuted for violating a city ordinance on a complaint without a formal information, if it is provided for by law. The question then arises, whether under the law a person violating a municipal ordinance may be prosecuted on a complaint without an information being filed.

Section 98.530, RSMo 1959, which applies to cities of the fourth class, provides:

"All prosecutions for the violation of city ordinances shall be entitled 'The city of _____ against _____' (naming the city and the person or persons charged), and the mayor or police judge shall state in his docket the name of the complainant, the nature and character of the offense, the date of the trial, the names of all witnesses sworn and examined, the finding of the court or jury, the judgment of fine and costs, the date of the payment, the date of issuing commitment, if any, and every other fact necessary to show the full proceedings in each case. The complaint, when made by the marshal or any policeman against any person arrested without process and in custody, shall be reduced to writing and sworn to by such officer before such person shall be put upon his trial. In no case shall a judgment of conviction be rendered except when sufficient legal testimony is given on a public trial or upon a plea of guilty made in open court."

The above statute was construed by the court in City of Richland v. Null, 194 Mo.App. 176, 185 S.W. 250. This statute is in substantially the same language as it was when this case was decided, and the court held that under this statute a warrant could be issued and prosecution had for violation of a city ordinance in a fourth class city on a complaint, without an information being filed.

Supreme Court Rule 37.08 provides:

"A complaint of the commission of an offense, verified by oath or affirmation, may be filed with the judge or court having jurisdiction of the alleged

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offense and if the prosecutor is authorized to prosecute on such complaint without filing an information, or if an information shall be filed thereon by the prosecutor, or without a complaint by the prosecutor, the judge of such court, or the clerk when so authorized by law if a complaint or information is filed by the prosecutor, shall immediately issue a warrant for the arrest of the accused directed to any officer authorized by law to execute it, if such accused has not been taken into custody on summary arrest. The prosecutor shall be promptly informed of any complaint filed whether or not a warrant has been issued thereon. After an investigation, if the prosecutor is satisfied that there are reasonable grounds to believe that an offense has been committed and that a case against the accused can be made, he shall file an information with the judge or court founded upon or accompanied by such complaint, or prosecute such offense on said complaint if authorized by law to prosecute thereon without filing information. All Traffic Cases shall be prosecuted in these Rules as to Traffic Cases." (Emphasis supplied.)

It is the opinion of the department that under the Rules of the Supreme Court and under the law, a warrant may be issued for the arrest of a person on a complaint for violating a municipal ordinance in a fourth class city, without a formal information being filed, unless the offense is a traffic offense; the procedure for which is governed by other Supreme Court Rules as hereinafter discussed.

Supreme Court Rule 37.08, supra, expressly provides that all traffic cases shall be prosecuted by information or complaint in the form provided in these Rules for traffic cases.

Supreme Court Rules 37.46 to 37.50 govern the procedure and practice for traffic court cases.

Supreme Court Rule 37.46 provides that in traffic cases the complaint or information and summons shall be in the form known as the "Uniform Traffic Ticket", substantially as the same is set out in Rule 37.1162. It provides the Uniform Traffic Ticket shall consist of four parts: (1) the complaint or information printed on white paper; (2) the abstract of court record for state licensing authority which shall be a copy of the complaint or information printed on yellow paper; (3) the police record which shall be a copy of the information printed on pink paper; and (4) the summons printed on white color; the reverse side shall be set out in said form with such additions or deletions as are necessary to adapt the Uniform Traffic Ticket to the jurisdiction involved. The notice of appearance, plea of guilty and waiver, shall be printed on the summons.

Honorable Jack E. Gant

The forms for the Uniform Traffic Ticket are set out in Rule 37.1162 and are to consist of four separate sheets of paper as required by Rule 37.46 with certain questions printed thereon with the space for the answers to be filled in by the officer, and for certain information to be recorded thereon of the facts concerning the offense with which the accused is charged. These forms are printed in quadruplicate with the reverse side for each copy for recording certain information thereon, including court proceedings and other information. Space is provided in the forms for the officer to insert in the Summons the court time and place the accused is summonsed to appear. On the reverse side of the "Summons" provision is made for the accused to sign a statement entering his appearance and plea of guilty to the offense as charged "on the complaint [or information]." Attention is called to the fact that provision is made on this form for the accused to enter a plea of guilty to a complaint as well as to an information, if one has been filed.

Supreme Court Rule 37.48, provides in part as follows:

"(a) The court may direct the issuance of a warrant for the arrest of any resident of this state, or any nonresident upon whom process may be served in this state, who fails to appear and answer a traffic ticket or summons lawfully served upon him and against whom an information has been filed by the proper prosecuting attorney or city attorney. Such warrant may be directed to any peace officer of the state and may be executed in any county in this state." (Emphasis supplied)

Under this rule if the accused fails to appear as provided in the summons "and against whom an information has been filed by the prosecuting attorney or city attorney" the court may issue a warrant for arrest. Attention is called to the fact that under this Rule an information must be filed before a warrant for arrest can be issued by the court.

In City of Elvins v. DePriest, 398 S.W.2d 22, the St. Louis Court of Appeals reversed a conviction of a person charged with an improper display of a city auto license on his car, in violation of a city ordinance. The Uniform Traffic Ticket had not been used and no sworn complaint or information had been filed. The prosecution was based on a traffic ticket used by the City of Elvins and merely signed by the city marshal, without oath.

In Kansas City v. Asby, 377 S.W.2d 511, the Kansas City Court of Appeals held that a Uniform Traffic Ticket signed by a police officer for a violation of a city ordinance was not sufficient to

Honorable Jack E. Gant

sustain a conviction, for the reason that a city ordinance of Kansas City requires all prosecutions for ordinance violations to be commenced by filing of an information, signed by the city counselor or his assistant. The court cited that portion of Rule 37.1162 which provides: "Such form to be used as is applicable and in accord with the law of the particular jurisdiction." The court cited City of Kansas v. O'Connor, 36 Mo.App. 594, which held that under the ordinances of the City of Kansas, a warrant for arrest could be issued for a violation of a city ordinance, based on a complaint of any person, but under the ordinances a prosecution may be had only after an information has been filed by the city attorney.

It is our opinion that the above cases must be considered as authority only on the facts existing in the cases, and are not controlling or authoritative on the question now under consideration.

It is the opinion of this office that a warrant for the arrest of a person for violating a municipal traffic ordinance in a fourth class city cannot be issued until after an information has been filed by the city attorney.

In your second question you inquire whether it is necessary for the city attorney in a fourth class city to be present to serve as prosecutor when the police judge holds court.

Section 79.230, RSMo, which applies to cities of the fourth class, provides that the mayor, with the approval of the board of aldermen, shall have power to appoint a city attorney, or employ special counsel.

Section 79.290, RSMo, provides that the duties, powers and privileges of city officers, unless otherwise defined, shall be prescribed by ordinance. There is no statute that defines the powers, duties and authority of a city attorney in a fourth class city.

It is the opinion of this office that in the absence of a city ordinance it is not necessary for the city attorney in a fourth class city be present to serve as prosecutor when the police court is in session.

CONCLUSION

It is the opinion of this office that:

1. Under the law and Rules of the Supreme Court, a warrant may be issued for the arrest of a person on a complaint for violating a municipal ordinance in a fourth class city without formal information being filed, unless the offense charged is a traffic offense.

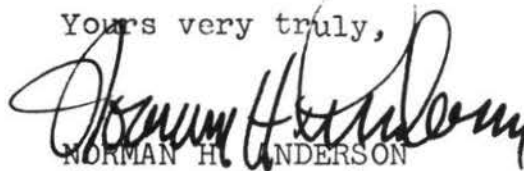
Honorable Jack E. Gant

2. A warrant for the arrest of a person for violating a municipal traffic ordinance in a fourth class city cannot be issued until after an information has been filed.

3. In the absence of a city ordinance it is not necessary for the city attorney in a fourth class city to be present to act as prosecutor when the police court is in session.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

BRIDGES: Tax monies raised under Section 137.555, RSMo
ROADS: 1959, can only be spent for use on county
ROAD DISTRICTS: roads and bridges, but may not be spent on
COUNTIES: bridges within a special road district. Expend-
TAXATION: iture of these funds is limited to those purposes
specified by statute.

OPINION NO. 36
No. 178 (1967)

January 18, 1968

Honorable Allen S. Parish
Prosecuting Attorney
Saline County Courthouse
Marshall, Missouri 65340



Dear Mr. Parish:

This opinion is written to consider four questions which you submitted as follows:

- "1. May the County Court spend any part of '137.555 funds' on county roads other than the kind described in Section 137.555?
- "2. May the County Court spend any part of the '137.555 funds' on special road district roads or return any part of the 1/5 part to the special road district?
- "3. What may the County Court do with that part of the '137.555 funds' which is not spent for any lawful purpose?
- "4. May the County Court spend any other tax money other than '137.555 funds' on county or special road district roads?"

The pertinent parts of Section 137.555, RSMo 1959, are set out hereafter for ease in understanding your problems.

"In addition to other levies authorized by law, the county court * * *, in their discretion may levy an additional tax, * * * all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose

Honorable Allen S. Parrish

whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village."

Monies that accrue to the county under the provisions of Article IV, Section 30(a), Missouri Constitution, as part of the County Aid Road Fund, are not considered to be within the ambit of your inquiry.

In considering your first question, it seems implicit in your request that the funds you refer to in your question are those funds only derived from taxes imposed under Section 137.555, RSMo 1959. Under this statute, those monies collected by such tax which are collected outside a special road district limits and the twenty percent retained by the county of those monies collected from taxes on property within a special road district are set aside for use by the county court on roads and bridges other than state highways. Under Section 50.550, RSMo Supp. 1965, these monies constitute and are budgeted by the county court for the Special Road and Bridge Fund "to be used for road and bridge purposes and for no other purpose whatever" as is specifically provided in these terms in Section 137.555, RSMo 1959.

We therefore conclude that the monies derived from any taxes imposed under authority of Section 137.555, supra, must be expended

Honorable Allen S. Parrish

on county roads and bridges within the county or a city street where it constitutes a continuous part of a road network within the county (Opinion No. 253 of Attorney General, to Lauderdale, dated September 22, 1965) except bridges located in a Special Road District. This limitation will be more fully explained later in this opinion.

Your second question whether the county court may expend its Section 137.555 monies on roads in a special road district is answered in the affirmative, but to understand our reasoning, you need a knowledge of its legislative history which we will set out briefly in the following paragraphs.

It is appropriate at this time to point out that prior to the amendment of Section 50.680 and Section 50.710, the classification of class three county expenditures specifically excluded any expenditures "in any special road district." This office has so held in many opinions in the past (Opinion No. 96 of Attorney General, to Whinrey, dated March 1, 1948, and others).

However, the above referenced statutes, Sections 50.680 and 50.710, RSMo Supp. 1965, were later amended with the words "not in any special road district" deleted. In lieu thereof, two new subsections were enacted for class three expenditures which read as follows:

Section 50.680 - 3(a) -

"The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or construction of bridges and roads on other than state highways. The funds set aside and apportioned in this class shall be made from the anticipated revenue to be derived from the levies made under section 137.555, RSMo. This shall constitute the third obligation of the county."

Section 50.710 - 3(a) -

"Repair, upkeep and construction of roads and bridges on other than state highways. List roads and bridges to be constructed."

Section 50.680 and 50.710, RSMo 1959, were repealed by Senate Bill No. 3, 73rd General Assembly, and the two new subsections were enacted (supra). Under this Bill, the former class three expenditures were divided into two types, Class 3(a) (which is involved here) and Class 3(b) (which deals with funds accruing under Article IV, Section 30(a), Missouri Constitution, known as

Honorable Allen S. Parrish

The County Aid Road Fund). Essentially, the sum of the differences between the old section and the two new sections is the deletion of the words "(and not in any special road district)" so far as may be pertinent here. As we noted above, the phrase "(and not in any special road district)" prevented the county court from spending its money derived from Section 137.555 RSMo, on roads within a special road district.

Section 50.680 and Section 50.710, RSMo Supp. 1965, were later repealed in toto by Laws 1965, p. 155, H.B. No. 205 §1, effective January 1, 1967.

A new Section 50.540, RSMo Supp. 1965, became effective January 1, 1967. This, in turn, brought into operation (and now applicable to third and fourth class counties) Section 50.550, RSMo 1959. The latter statute (Section 50.550) provides, in pertinent parts, that:

"* * *The budget shall contain adequate provisions for the expenditures necessary . . . for the repair and upkeep of bridges other than on state highways and not in any special road district, * * *".

Sections 137.555, RSMo 1959 and 50.550, RSMo 1959, are in pari materia and are to be read and construed together with effect legislature (Mitchum v. Perry, 390 S.W.2d 600).

Considering Section 137.555, supra, and Section 50.550, supra, we conclude that the county court of your county may expend those sums of monies received under Section 137.555 for any county road (except on state highways) including roads in special road districts and city streets which form a part of the county network of roads and any county bridge not located in any special road district.

We note that Section 233.115, RSMo 1959 appears to contradict in part the provisions of Section 50.550, supra, in that Section 233.115 apparently (and when considered alone) authorizes "the county court of the county in which said special road district is located may in its discretion, out of the funds available to it * * *construct, maintain, or repair any bridge * * * or culvert" in "eight mile" road districts. Inasmuch as Section 50.500 (supra) specifically states tax monies accumulated and paid to a county may not now be expended on a bridge in a special road district, we conclude such funds are not available to a county court for these purposes.

Honorable Allen S. Parrish

Your third question is answered by the statute itself wherein the expenditure of funds accumulated under Section 137.-155 are limited to spending them on roads and bridges as we have discussed in the paragraphs above. Any other use would be unlawful. The funds must be spent for a lawful purpose. Your third question is answered then by Section 137.555, supra, itself.

Your fourth question is not considered at this time since you do not indicate what tax monies were contemplated. Any opinion we would express would be conjecture. If you have a specific tax source that you have in mind and need to know about using all or part of the proceeds from that tax levy for road and bridge purposes, we request you then submit the specific facts.

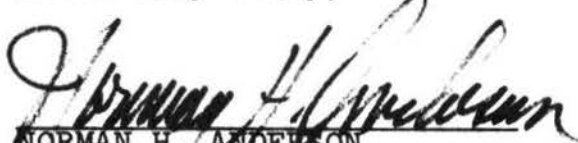
CONCLUSION

It is the opinion of this office that:

1. Tax monies collected by a third class county pursuant to Section 137.555, RSMo 1959 are budgeted by the county court for the Special Road and Bridge Fund to be used for county roads and bridges to include city streets where such city streets are a part of a continuous county road network but may not be used on bridges within a special road district.
2. Monies collected by the county pursuant to Section 137.555, RSMo 1959, may be expended only on county roads and bridges to include roads in special road districts and city streets where they are part of a continuous county road network but may not be expended on a bridge within a special road district or for any other purposes except those authorized by statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,

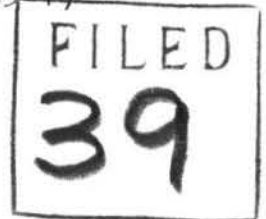

NORMAN H. ANDERSON
Attorney General

FARMERS' MUTUAL INSURANCE
COMPANIES:
INSURANCE:

The intent of the legislature expressed in Section 380.490, RSMo 1959, is to limit the sale of fire and lightning insurance by Farmers' Mutual Companies to ". . . . counties in which they are organized, and in adjoining counties and in counties of which a county line of said county is not more than one mile distant from the county line in which said mutual insurance company is organized." A Farmers Mutual selling fire and lightning insurance in any other county violates such law.

OPINION NO. 39
No. 210 (1967)

April 18, 1968



Mr. Robert D. Scharz, Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Scharz:

Reference is made to your letter and subsequent telephone conversations requesting the formal opinion of this office on a question as follows:

The Bankers Security Mutual Insurance Company of Kansas City, Missouri, was incorporated on February 19, 1953, under the provisions of the Farmers' Mutual Insurance Law, Sections 380.480 to 380.570, RSMo 1949. The question which has arisen is in what counties may a company organized under those provisions write fire and lightning insurance. More specifically, can they write fire and lightning insurance in any and all counties of the state or are they limited to their home counties adjoining counties and counties of which a county line of said county is not more than one mile distant from the county line in which the farmers' mutual is organized?

Mr. Robert D. Scharz

The Farmers' Mutual Insurance Law was thoroughly revised in 1953. As amended, the law provides that no new Farmers' Mutual insurance companies can be formed under the "old law" provisions of Sections 380.481 to 380.570. Section 380.479, RSMo 1959. Farmers' Mutuals formed after the 1953 revision are governed by Sections 380.580 to 380.840, RSMo 1959. In addition, Farmers' Mutuals incorporated under the old law may elect to be governed by the new provisions added in 1953. Section 380.600, RSMo 1959. If they do so, they subject themselves to the regulation of the Division of Insurance. However, if they do not elect to be governed by the new law, they remain subject to and governed by the provisions of the old law, Sections 380.479 to 380.570, RSMo 1959. It is our understanding that Banker's Security Mutual has not elected to be governed by the new law.

The company with which we are presently concerned was formed under the provisions of Sections 380.480 to 380.570, RSMo 1949. That law is substantially re-enacted by Sections 380.479 to 380.570, RSMo 1959. In fact, the provision with which we are most concerned, Section 380.490, was not changed by the 1953 revision and is identical with the version existing in 1949.

Section 380.490 pertains to "all farmers' mutual fire and lightning companies". Subsection 5 of this section states that:

"5. Such companies shall do business only in counties in which they are organized, and in adjoining counties and in counties of which a county line of said county is not more than one mile distant from the county line of the county in which said mutual insurance company is organized."
(underlining added).

Section 380.500 relates to tornado, windstorm and cyclone insurance companies and subsection 2 thereof states that:

"2. Such companies shall do business only in the congressional districts in which they are organized until they shall have four hundred thousand dollars worth of property or more insured, then any such company may do business in any or all counties of this state."

Hail insurance companies, covered by the provisions of Section 380.510, are authorized to do business in "any or all counties of this state".

Mr. Robert D. Scharz

From the foregoing, it seems clear that the legislature intended to separate Farmers' Mutual insurance companies according to the types of insurance that they wrote. Companies writing fire and lightning insurance are limited to a more restricted area than those writing hail insurance or tornado, windstorm and cyclone insurance.

The company with which we are dealing, Banker's Security Mutual, was clearly incorporated for the purpose of selling fire and lightning insurance. Article V of the Articles of Incorporation states in part that:

" . . . this corporation in anticipating losses and expenses for two years next following the date of assessment may anticipate such losses and expenses in any amount not to exceed two percent of the amount of insurance in force on the date of any assessment . . . provided that the expenses of operating this corporation exclusive of losses, in any one year shall not exceed twenty-five cents per \$100 of insurance in force; provided further that this company shall have all powers, rights, duties, privileges, and immunities of Section 6177 of the Laws of Missouri, 1947."

Section 6177 mentioned above dealt with fire and lightning companies. The two per cent figure for the anticipated losses is also drawn from the section relating to fire and lightning companies, as is the operating expense figure of twenty-five cents per \$100 of insurance in force. Therefore, although the articles of incorporation of Banker's Security do not use the terms fire and lightning insurance, it is clear that the purpose of the charter is to authorize the sale of fire and lightning insurance.

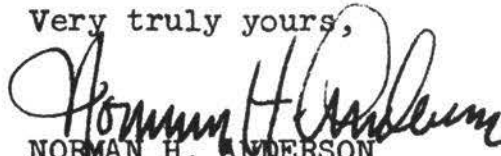
CONCLUSION

It is the opinion of this office that the intent of the legislature expressed in Section 380.490, RSMo 1959, is to limit the sale of fire and lightning insurance by Farmers' Mutual Companies to ". . . counties in which they are organized, and in adjoining counties and in counties of which a county line of said county is not more than one mile distant from the county line in which said mutual insurance company is organized". A Farmers mutual selling fire and lightning insurance in any other county violates such law.

Mr. Robert D. Scharz

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

OPINION REQUEST NO. 40 (1968)
220 (1967)

ANSWER BY LETTER (McFADDEN)
January 29, 1968

Hon. Thomas W. Shannon
Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri



Dear Mr. Shannon:

Your assistant, Allen I. Harris, requested an opinion of this office as follows:

"Section 557.215 RSMo 1965 makes striking an Officer in the performance of his duties a felony. Assuming that the facts would indicate the victim was a police officer, in full uniform, and making a valid arrest, would an indictment on the lesser offense of common assault lie, or does 557.215 preempt the common assault."

Our statutes provide for the inclusion of lesser offenses within greater offenses (556.230 RSMo 1959) so that the charge on any given set of facts may consist of either, depending upon the desires of the particular Prosecutor, see State v. Higgins, 252 S.W. 2d 641.

If the lesser offense is charged, the court before whom it is tried has the discretion of proceeding to a verdict or discharging the jury and referring the matter for trial on the greater crime, Section 556.210 RSMo 1959.

Thus the crime about which you inquire may be tried as either common assault or as the felony named in Section 557.215 RSMo 1967 Cum. Supp.

Because of the unique situation existing in St. Louis where your office is charged with the prosecution of misdemeanors and the Circuit Attorney's Office prosecutes felonies,

Hon. Thomas W. Shannon

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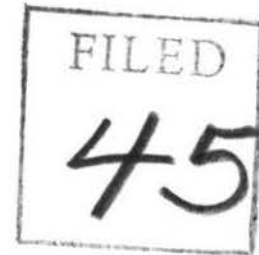
we suggest that you get together with the Circuit Attorney to work out an understanding as to policy.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

cc: Hon. James E. Corcoran
Circuit Attorney
Municipal Courts Building
14th and Market Streets
St. Louis, Missouri

April 2, 1968



OPINION NO. 45-68
Opinion No. 246-67

Answered by Letter
Chitwood

Honorable Frank L. Mickelson
State Representative
District No. 110
Freeman, Missouri 64746

Dear Representative Mickelson:

This office is in receipt of your request for a legal opinion in which you inquire if the Council of the Special Charter City of Pleasant Hill, Missouri, can levy an additional twenty-five cent special tax for street and road purposes, in addition to the one-dollar tax for general municipal purposes.

We call attention to Section 8 of the Charter of the City of Pleasant Hill, Missouri. Said section provides in part as follows: ".... also, to levy and collect taxes on all real and personal property in said city, subject to taxation by law, not exceeding one percent on the assessed value thereof. Act of March 19, 1868....".

Article X, Section 11(b), Constitution of Missouri, fixes the limitation on local tax rates of property by municipalities, counties, or school districts for their respective purposes. For municipalities, the annual rate shall not exceed one dollar on the one-hundred dollars assessed valuation.

Article X, Section 11(c) of the Constitution also provides the above-mentioned limitation of rate of municipalities, counties and school districts may be further increased for their respective purposes for not to exceed four years.

Such section further provides the rate therein fixed may be further limited by law, and that any political subdivision, when authorized and within the limits fixed by law, may levy a tax on all taxable property in excess of rates therein limited for library, hospital, public health, recreation grounds and museum purposes.

Section 94.340 RS Mo. 1959, provides the maximum rate of taxes, for municipal purposes, for all special charter cities and the method by which that rate may be increased. Said section provides that by ordinance, the city council of such a city may impose an annual tax for municipal purposes upon all taxable property within the city, not to exceed the rate of one dollar on the one-hundred dollars assessed valuation. This rate, for municipal purposes, may be increased to a rate of not to exceed thirty cents on the one-hundred dollars assessed valuation, in addition to the one-dollar levy, mentioned above. Such increased rate may be levied for not longer than four years, when the rate and purpose of the increase are submitted to a vote of the qualified voters within the city, and two thirds of those voting at such election vote in favor of the increase. It is noted that the increased rate shall be for municipal purposes, and the section does not provide it may be authorized for streets and roads.

The procedure for calling and holding a special election to increase the tax rate mentioned above is described in paragraphs 2, 3 and 4 of Section 94.340.

In addition to the general tax levy provided by Section 94.340 RS Mo. 1959, Section 94.350 RS Mo. 1959 authorizes an annual tax levy not to exceed the rate and for any of the special purposes authorized by the section.

Said section authorizes the additional tax levy, for any of the special purposes mentioned therein, and no others which are: for library purposes, hospital, public health and welfare and recreation grounds. Streets and roads are not mentioned in the section and a special tax cannot be levied under this section for that purpose.

Therefore, it is the opinion of this office that the Council of the Special Charter City of Pleasant Hill is not authorized to levy, by ordinance, a twenty-five cent special tax for streets and roads in addition to the one-dollar tax for municipal purposes they may levy by ordinance. Said council is not authorized to submit the proposition to the qualified voters at an election as to whether or not a special tax of twenty-five cents for streets and roads in addition to the tax of one dollar for municipal purposes shall be adopted.

Honorable Frank L. Mickelson
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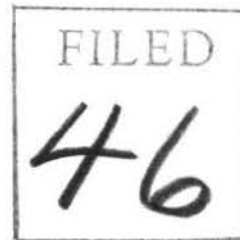
However, the tax rate for general municipal purposes may be increased for a period of not in excess of four years and not to exceed thirty cents on the hundred-dollars valuation by a vote of two thirds of the qualified electors of the city voting on such question.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

April 30, 1968

OPINION NO. 46
250 (1967)
Answered by Letter
(Weber)



Honorable Carl D. Gum
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Gum:

In your request for an opinion, you state the problem as follows:

"If a truck hauls from Kansas City, Missouri, to Paola, Kansas, and then hauls the load into Drexel, Missouri, is it necessary for the truck to have Missouri Public Service Commission authority?"

The following additional facts will aid in seeking a conclusion: The trucker in Kansas City, Missouri has no Missouri Public Service Commission authority whatsoever. That is, he has neither a certificate of public convenience and necessity to operate in intrastate commerce under Section 390.051, RSMo Supp. 1967, nor does he have a permit from the Missouri Public Service Commission to operate in interstate commerce under Section 390.071, RSMo 1959. The shipper contacts the truckline to haul a shipment from Kansas City, Missouri to Drexel, Missouri. The truckline does have authority from the Interstate Commerce Commission to haul shipments from Kansas City, Missouri to Paola, Kansas and to haul shipments from Paola, Kansas to Drexel, Missouri. The truckline prepares two bills of lading.

Honorable Carl D. Gum

The first bill of lading consigns the shipment from Kansas City, Missouri, to the trucklines dock in Paola, Kansas. The second billing of lading consigns the shipment from the truckline's dock at Paola, Kansas, to Drexel, Missouri.

The first observation to be made is that a motor carrier operating in Missouri must obtain either an intrastate commerce certificate of public convenience and necessity under Section 390.-051, RSMo Supp. 1967, or an interstate commerce permit under Section 390.071, RSMo 1959. Even if the trucker is legitimately operating in interstate commerce under authorization from the Interstate Commerce Commission, if he engages in interstate commerce on the highways of Missouri, he must have a permit from the Missouri Public Service Commission by virtue of Section 390.-071, RSMo 1959, which reads in part as follows:

"No person shall engage in the business of a motor carrier in interstate commerce on any public highway in this state unless there is in force with respect to such carrier a permit issued by the commission authorizing such operations. * * * *"

Furthermore, a motor carrier operating in Missouri must display an annual license issued by the Public Service Commission regardless of whether the carrier is an interstate or an intrastate motor carrier. Section 390.136, RSMo 1959 reads in part as follows:

"No motor carrier, except as provided in section 390.030, shall operate, under a certificate or permit, any motor vehicle unless such vehicle shall be accompanied by an annual license issued by the public service commission; provided, that when a motor carrier uses a truck-tractor for pulling trailers or semitrailers said motor carrier may elect to license either the truck-tractor, trailer or semitrailer. The fee for each such annual license shall be twenty-five dollars and shall be due and payable on or before January fifteenth of each calendar year. Such annual license shall be issued in such form and shall be used pursuant to such reasonable rules and regulations as the commission may, by general order or otherwise, prescribe. * * * *"

Honorable Carl D. Gum

The question arises as to the proper action to be taken in the present case. The motor carrier in your request does not possess either a certificate of public convenience and necessity to operate in intrastate commerce or a permit to operate in interstate commerce. If the carrier is cited by the highway patrol, the prosecutor may choose to take any of several courses of action.

Section 390.171, RSMo 1959 makes a violation of Section 390.-011 to Section 390.176 a misdemeanor:

"Every owner, officer, agent or employee of any motor carrier, and every other person, who violates or fails to comply with or who procures, aids or abets in the violation of any provision of sections 390.011 to 390.176, or who fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the commission, or who procures, aids or abets any person in his failure to obey, observe or comply with any such order, decision, rule, direction, demand or regulation thereof shall be guilty of a misdemeanor."

If the prosecutor feels the motor carrier is legitimately operating in interstate commerce, he may institute an action against the motor carrier for an alleged violation of Section 390.136, RSMo 1959, for failure to display an annual license or for an alleged violation of Section 390.071, RSMo 1959 for failure to obtain an interstate commerce permit from the Public Service Commission.

Rather than bringing the action himself, the prosecutor may choose to notify the Missouri Public Service Commission who may investigate the matter and bring an action against the motor carrier for lack of a permit under Section 390.156, RSMo 1959, which reads as follows:

"An action to recover a penalty or a forfeiture under sections 390.011 to 390.-176 or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. In any such action all

Honorable Carl D. Gum

penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission, the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in sections 390.011 to 390.176, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order."

If the prosecutor is of the opinion that the federally certified motor carrier is illegally engaged in intrastate commerce, the action becomes more complicated. In Service Storage and Transfer Co., Inc. v. Virginia, 359 U.S. 171, 3 L.Ed 2d 717, 79 S.Ct. 714 (1959), the Supreme Court held that:

"Before a state may impose criminal sanctions upon a federally certified motor carrier for transporting, without a state certificate, shipments between points within the state via a point outside the state, the interpretation of the carrier's interstate commerce certificate should first be litigated before the Interstate Commerce Commission under § 204(c) of the Motor Carrier Act (49 USC § 304(c)), authorizing the filing of a complaint to the commission by a state board that a carrier has abused its certificate."

In the Service Storage case, an interstate motor carrier certified by the Interstate Commerce Commission, transported shipments between points in Virginia, but routed them through its headquarters in West Virginia. The Virginia State Corporation Commission fined

Honorable Carl D. Gum

the carrier because of its failure to obtain a certificate for its intrastate operations. The court held that the state had no power to impose criminal sanctions upon an interstate motor carrier certified by the Interstate Commerce Commission for its failure to obtain state certification for its alleged intrastate operations since such sanctions would be tantamount to a partial suspension of the carrier's federally granted certificate. But, the court went on to say that a state which believes that the operation of a motor carrier certificated by the Interstate Commerce Commission is not bona fide interstate but merely a subterfuge to escape state jurisdiction, may avail itself of the remedy in Section 304(c) of the Motor Carrier Act (49 USC § 304(c)) authorizing the filing of a complaint to the Commission by a state board that the carrier has abused its certificate.

We have formerly stated that by virtue of Section 390.171, RSMo 1959, the prosecuting attorney may bring an action against the motor carrier for an alleged violation of any provision of sections 390.011 to 390.176. Therefore, theoretically speaking, the prosecutor could initiate the action against the motor carrier for failure to obtain intrastate authority under Section 390.051 RSMo Supp. 1967. But, according to the Service Storage case, supra, the interpretation of the certificate of public convenience and necessity issued by the Interstate Commerce Commission should be made in the first instance by the I.C.C. The prosecuting attorney may file a complaint to the I.C.C. alleging that the carrier has abused its certificate by virtue of the remedy provided in Section 304(c) of the Motor Carrier Act which reads as follows:

"(c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto, If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint."

Honorable Carl D. Gum

It would be an expensive and complicated procedure for the prosecuting attorney to initiate the action against the motor carrier for lack of intrastate authority, and even if the prosecuting attorney was successful, the most severe penalty that could be invoked against the carrier would be a conviction of a misdemeanor under Section 390.171, RSMo 1959.

On the other hand, the Missouri Public Service Commission is equipped to prosecute these cases and would be an appropriate agency to file the complaint with the Interstate Commerce Commission. Also, the penalties available to the Public Service Commission are much more severe and range from \$100 per day per violation up to \$2000.

The ultimate question in your request is whether the trucker must obtain Missouri Public Service Commission authority. Of course, we have determined that he must obtain a Missouri Public Service Commission permit under Section 390.071 RSMo 1959, if he is legitimately engaged in interstate commerce. The question of the requirement of a Missouri Public Service Commission certificate of public convenience and necessity under Section 390.051, RSMo Supp 1967 is more complicated and cannot be answered conclusively for several reasons. As a practical matter, the Public Service Commission is the appropriate agency to initiate the action since the Commission is equipped with the expertise and the machinery to litigate the case. Secondly, accordingly to the cases cited, where a federally certificated carrier is involved, the interpretation of such certificates of public convenience and necessity should be made in the first instance by the Interstate Commerce Commission. Finally, whether the system of circuitous routing employed by the carrier is a subterfuge for hauling freight in intrastate commerce depends upon many factors such as efficiency of routing, comparative interstate and intrastate rates and the intent of the trucker. Without a hearing, it would be impossible to reach a conclusion as a matter of law.

Although an action against the federally certified carrier for lack of a Missouri certificate of public convenience and necessity could best be initiated by the Missouri Public Service Commission, an analysis of the pertinent cases will assist you in deciding whether the routing employed by the carrier is a subterfuge to evade the state laws and action should be taken.

In Service Storage and Transfer Co. v. Virginia, supra, an interstate motor carrier was fined \$5,000.00 for carrying ten shipments alleged to have been of interstate character. The shipments originated at Virginia points and were destined to Virginia points, but were routed through Bluefield, West Virginia (the main terminal). They were transported in a vehicle with freight destined

Honorable Carl D. Gum

to points outside of Virginia. Upon arrival at Bluefield, the freight destined to Virginia was removed and consolidated with freight coming to the terminal from non-Virginia origin. It then moved back into Virginia to its destinations. The Corporation Commission found that the routes through Bluefield were a subterfuge to evade state law.

The U. S. Supreme Court held that the matter should first be litigated before the Interstate Commerce Commission, but went on to say that the shipments were, on their face interstate shipments. The court noted several factors: Though the routes were circuitous and often long, sometimes exceeding twice the shortest possible routes, the state offered no direct evidence of bad faith on the part of the carrier. The business had been carried on in a similar manner for many years under Interstate Commerce Commission authority. The court said the "operation is not only practical, efficient and profitable, but also the creation of this 'flow of traffic' is a timesaver to the shipper since there is less time lost waiting for the making up of a full truckload." The alleged intrastate shipments constituted only a small percentage of the carrier's operations.

In an older Missouri case, Eichholz v. Missouri Public Service Commission, (1939), 59 S.Ct. 532, 306 U. S. 268, 83 L.Ed. 641, a motor carrier hauled goods consigned to persons in Kansas City, Missouri, from St. Louis, Missouri, over the state line to Kansas City, Kansas, and then back to its intended destination in Kansas City, Missouri. The Public Service Commission found that the carrier had unlawfully engaged in intrastate commerce under the pretense of transacting interstate business. The following factors were relevant: The evidence showed an industrious solicitation of transportation business from St. Louis, Missouri to Kansas City, Missouri, at an interstate rate which was much lower than the intrastate rate. Further evidence disclosed that this was not the normal, regular or usual route; that the same routes were used in delivering merchandise after it had been hauled in the first instance to the terminal in Kansas City, Kansas, one-half mile across the state line. The evidence further showed that in most instances the carrier did not unload the goods, but merely changed drivers, sometimes with the same tractor and trailer and returned the goods to Kansas City, Missouri. The district court found that the method of operation employed was designed to afford shippers the benefit of a lower rate and was not in good faith.

In Jones Motor Co. v. U.S., 218 F. Supp. 133 (E.D. Pa.1963), a carrier operating without intrastate authority combined shipments between two points in Pennsylvania with interstate shipments, routing them through New Jersey. The court reversed the Interstate Commerce

Honorable Carl D. Gum

Commission and affirmed the examiner's position that: (1) The longer circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge, and, (2) there existed logical, practical and feasible reasons from the standpoint of operating efficiency and economy for the questioned operations.

In three consolidated cases, Service Trucking Co. Inc. v. United States, 239 F. Supp. 519 (D. Md. 1965) affirmed 382 U.S. 43, 86 S.Ct. 183, 15 L.Ed. 2d 36 (1965); Hudson Transportation Co. v. U. S. and Arrow Carrier Corp. v. U. S., reported jointly at 219 F. Supp. 43 (D.N.J. 1963), affirmed 375 U.S. 452, 84 S.Ct. 524, 11 L.Ed. 2d 477 (1964), the carriers were held to have operated in bad faith and in a manner to avoid the state law by subterfuge. Hudson and Arrow admitted in substance that were it not for their lack of authority to operate intrastate, they would have used the more direct routes. In addition, neither company performed terminal service at out-of-state points while moving the traffic between state points. Service Trucking used the more direct routes for nonregulated intrastate traffic and for multistate shipments. However, circuitous routes were used where intrastate authority was lacking. In these cases circuitous routes were used for the sole purpose of evading regulations. The court stated that the routes were not logical or normal operations; that this was a deliberate calculated method employed by the carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission. The evidence overwhelmingly pointed to the routes as artificial contrived arrangements to obtain intrastate business not otherwise available.

In Rock Island Motor Transit Co. v. United States, 256 F. Supp. 812 (1966), the evidence sustained the finding of the Interstate Commerce Commission that the interstate motor carrier's practice of circuitous routing and backhauling of shipments from points in Iowa to Nebraska and back to points in Iowa and from points in Iowa to Illinois and back to points in Iowa did not constitute a subterfuge to escape the jurisdiction of the state of Iowa by converting to interstate commerce what would be, but for circuitous routing and backhauling, intrastate commerce. The court held that the motor carrier's routings were generally efficient and not intended to attract intrastate traffic or evade the laws by subterfuge. The court found the following factors to be decisive; the routes were designed for efficient consolidation and carrier convenience; other carriers found it convenient to use the same routing techniques; only a small percent of the motor carrier's operations were questioned (3 percent). The method of

Honorable Carl D. Gum

operation was normal, logical and efficient and the carrier had acted in good faith. The difference in the direct route and the circuitous route was not great. Here, the court felt that the question of lawfulness should not be decided on the basis of comparative efficiency alone.

Missouri Public Service Commission v. Red Arrow Transit Co., No. MCC-4197, CCH Federal Carriers Cases, Interstate Commerce Commission, No. 469, Section 43,232 (Commission decision), involved shipments from Kansas City, Missouri, through Kansas to Joplin, Missouri, and Springfield, Missouri. The commission stated that the complainant had established no facts from which they could infer bad faith. Nor did he establish anything at all untoward or unreasonable about the carrier's use of its Kansas City, Kansas terminal and the Kansas route to handle the considered traffic moving between points in the Kansas City, Missouri area on the one hand and on the other, Joplin, Springfield and the other disputed Missouri points. Important factors in the commission's decision were the carrier's good faith and the reasonableness of the routing and operational method of handling the involved traffic.

The Commission stated:

"less than truckload traffic, as a matter of economic and practical necessity, generally must be handled from origin to a nearby terminal for assembly and consolidation into line-haul vehicles for movement to the terminal most convenient to the ultimate destination where the traffic must then be broken down for delivery in local equipment. This often results in other than the straight-line routes being used between origin and destination."

The above cases should be helpful in analysing the method of operation employed by the trucker in your opinion request. Note that he possesses no Missouri Public Service Commission authority or permit whatsoever. Furthermore, the fact that the two bills of lading are prepared and the goods are accepted for consignment to Drexel, Missouri, looks somewhat suspicious. At the same time, the method of operation may be legitimate in that the truckline is performing a terminal service at the out-of-state point and the shipments involved are in less-than-truckload amounts.

It is the opinion of this office that a motor carrier operating in Missouri must obtain either an interstate commerce certificate of public convenience and necessity under Section 390.051, RSMo Supp. 1967, or an interstate commerce permit under Section 390.071, RSMo 1959.

Honorable Carl D. Gum

Section 390.171, RSMo 1959 makes a violation of any provision of Sections 390.011 to Section 390.176 a misdemeanor. Therefore, it is within the authority of the prosecuting attorney to bring actions for such violations. However, before a state may impose criminal sanctions upon a federally certified motor carrier, for transporting shipments without intrastate authority, the interpretation of the carrier's interstate commerce certificate must first be litigated before the Interstate Commerce Commission.

By virtue of Section 304(c) of the Motor Carrier Act (49 U.S.C.A. § 304(c)), the prosecuting attorney or the Public Service Commission may file a complaint with the Interstate Commerce Commission to determine whether the carrier is, in fact, an interstate carrier. Due to the fact that the Public Service Commission is equipped with the machinery required to efficiently litigate cases involving unauthorized intrastate hauls and due to the fact that stiffer penalties are available under Public Service Commission proceedings, it is recommended that the Public Service Commission handle cases where a federally certified motor carrier is allegedly operating in intrastate commerce without authorization.

Yours very truly,

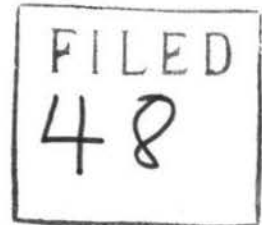
NORMAN H. ANDERSON
Attorney General

JSW:fb

REGISTRATION: When the voters approve registration under
COUNTY CLERKS: Chapter 116, the county clerk should commence
CITY COUNCILS: the registration processes as soon as is reasonably possible. Under Section 116.050, the county clerk has the discretion to designate the number and places of temporary registration as provided by statute. The city councils determine the precincts. In order to register, the voters must apply for registration at the clerk's office or such places of temporary registration as the clerk may designate.

OPINION NO. 48
No. 260 (1967)

January 30, 1968



Honorable Daniel R. Ferry
Prosecuting Attorney
Vernon County Courthouse
Nevada, Missouri 64772

Dear Mr. Ferry:

This opinion is prepared to answer your six questions which you submitted on the application of the laws involving the registration of voters in cities over 7,000 and less than 10,000 population, as provided in Chapter 116, RSMo 1959 as amended. The questions which you submitted are set out below:

- "1. When must the registration process be commenced and completed?
- "2. If a special election is called before registration is completed, what procedure is to be followed?
- "3. Does registration apply to all city, county, school and township elections, as well as to state and federal elections?
- "4. Under Section 116.050 must all temporary registration offices be open at the same time, or may such offices be scheduled for different times at different locations?
- "5. Who determines the size and boundaries of voting precincts or places within the city?

Honorable Daniel R. Ferry

"6. How are persons who are: residents of a nursing home or hospital; unable physically to attend the place of registration; or who are outside the city and not able to be physically present to register enabled to register if otherwise qualified, and seek, request or desire to register as a voter?"

Your first question on when the registration process should be commenced and completed is not clearly answered by the statute itself. Analysis of the applicable laws clearly establishes that this is a so-called "local option law" which the citizens of a city with a population between 7,000 and 10,000 can adopt as they wish. A discussion on the time local option laws take effect is found in Section 402 on "Statutes," 82 C.J.S. 970, where it states:

"The suspended provisions of a local option law will not be in force in any particular locality until all the steps required by statute have been taken.

"The language of an act affecting only particular subdivisions of a state must, with respect to the time it takes effect, be strictly followed, as where, by the terms of a statute, a question affecting only a particular subdivision of the state is authorized or directed to be submitted to the votes of such subdivision, or the application of a general law to particular localities is suspended until adopted in such localities by popular vote or the decision of some local government body, and the suspended provisions will not be in force in such locality until all the steps required by the statute have been taken. As a general rule, when a canvassing board to which is committed the duty of determining the result of such election decides that the provisions of the statute have been adopted, such decision is final and conclusive, and the courts are without authority to inquire whether all who participated in the election were legally qualified voters. * * * "

We find the Supreme Court En Banc in the case of State ex rel Pedrolie v. Kirby, 163 S.W.2d 964, held generally, that a law became effective when adopted and approved. You advised

Honorable Daniel R. Ferry

us that the law was voted upon by the people on April 4, 1967, and by a majority vote of the qualified electors of Nevada, the electorate adopted registration at such election.

Section 116.060, RSMo 1959, provides that:

"Within twenty days after the last day of the first general registration herein provided for, the county clerk shall cause the . . . affidavits of registration to be arranged into permanent binders, * * * "

Under Section 116.050, RSMo 1959, the county clerk is charged with arranging for registration places in Nevada, giving notice in the daily paper of their location places of temporary registration and the dates the places of registration will be opened to the public. The expenses of the initial registration are borne by the county court (Section 116.050, supra). The action should be taken as soon as possible after the registration has been voted upon and passed by the electorate of the citizens of Nevada. Under Section 116.030, RSMo 1959, the county clerk is in charge of such general registration and of all subsequent individual registrations provided for under Chapter 116. We hold, therefore, that when the people of Nevada adopted the registration laws provided under Chapter 116, they did so on April 4, by voting for the law, and it is the duty of the county clerk to initiate the registration of the citizens of Nevada as noted above, within a reasonable time after such election.

Your second question, involving the possibility of a special election that could be called before the registration is completed, is not considered at this time. Since this is a hypothetical question and no specific election is contemplated, we cannot consider your second question at this time.

Your third question, whether registration applied to all city, county, school and township elections as well as to state and federal elections, is so broad and general in its application that we are unable to precisely determine your exact question and the nature of its application. We, therefore, will not attempt to answer your question until such time as a special problem develops with respect to registration in Nevada and its application to a particular election.

Your fourth question is answered by stating that under Section 116.050, RSMo 1959, the county clerk designates not more than 27 places for registration in the first general registration

Honorable Daniel R. Ferry

and not more than 5 places for registration during any subsequent rush periods, as in his judgment such additional places are necessary, indicates that the number of places for general registration are left to his discretion. Further in said section, it provides that such temporary registration places may be kept open between the hours of 8:00 a.m., and 9:00 p.m. We hold that Section 116.050, RSMo 1959, left to the discretion and judgment of the county clerk the number of places to be open for the first general registration and the times that such individual offices are scheduled to be open.

Your fifth question is answered by Section 116.140, RSMo 1959, where it says that the city council may provide voting precincts in the ward. The wards, of course, are defined by the city council.

Your sixth question, on the registration of those physically unable to go to the places of registration because of illness, etc., does not appear to have been directly provided for by statute. It does provide for registering of voters at the office of the county clerk and at the temporary places provided for by Section 116.050, RSMo 1959. Generally speaking, the statutes do not provide for the registration of ill or physically disabled voters, as has been done in other chapters.

Section 116.050, RSMo 1959, does not impose a mandatory duty upon the county clerk to hold special registration, as the provisions of the above section are directory. It has been left to the discretion of the clerk as to whether he will or will not hold special registrations. In the event he elects to hold the registrations, then the statute does require the county clerk to provide for and give notice of the time and place or places of registration, by notice published in a daily paper in any such city, of the selection and location of such places of such temporary registration, and the dates for which the places will be open for the convenience of the voters (Section 116.050, RSMo 1959).

In view of these facts and the provisions of Section 116.050, RSMo 1959, it is believed that the kind of notice given to the prospective registrants informing them of the time and place of the registration, will be sufficient notice within the meaning of the statute.

There is no prohibition under the statute that would keep the county clerk from designating one or more of these homes where the ill may presently be confined, as a place of registration, providing the requirements of Section 116.050, are complied with.

Honorable Daniel R. Ferry

Accordingly, while there is no specific provision with respect to registering the physically infirm who cannot register in the usual manner, we see nothing that would prohibit the designation of one or more of the hospitals or institutions where the physically disabled may be, as places of registration, providing Section 116.050, RSMo 1959, is complied with.

CONCLUSION

It is the opinion of this office that in cities between 7,000 and 10,000 which have adopted the provisions of Chapter 116 RSMo:

1. The registration process should be commenced with a view to completion as soon after the election as it can reasonably be accomplished.
2. Under Section 116.050, RSMo 1959, the temporary places of registration are left to the discretion of the county clerk, providing they are operated within the period of time and manner specified by statute.
3. Pursuant to Section 116.140, RSMo 1959, the city council determines the size and boundary of the voting precincts within the city.
4. In order to register, the voters must register in the office of the county clerk or at such other places of temporary registration as may be provided for from time to time, under Section 116.050, RSMo 1959.
5. The county clerk, in his discretion, may designate various places of temporary registration - and providing there is compliance with Section 116.050, RSMo 1959 - such temporary places are appropriate places of registration. There would be no reason why an institution or other place where physically infirm or disabled voters are maintained, could not be designated as a place of temporary registration, provided the requirements of Section 116.050, RSMo 1959, are complied with. In this fashion those persons within the institution could be registered.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

PROSECUTING ATTORNEYS: There is no act of nepotism in the ap-
CONFLICT OF INTEREST: pointing by the prosecuting attorney as
NEPOTISM: his secretary the daughter of a county judge.
CONSTITUTIONAL LAW: The act of nepotism arises from the fact
COUNTY COURT: that the appointing officer who "names or
COUNTY JUDGE: appoints the employee" is, himself, related
to the employee within the prohibited degree
defined by statute.

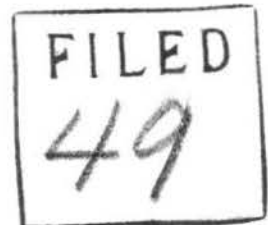
Inasmuch as there is no private business action which is involved where a prosecuting attorney appoints as secretary a woman who is the daughter of a county judge, there is no violation of the conflict of interest statutes found in Sections 105.450 to and including 105.495, RSMo Supp. 1965.

The "principles of public policy" are not violated by the appointing by a prosecuting attorney as his secretary the daughter of a county judge.

*See 1978 Amendments
to Ch 105.*

OPINION NO. 49(1968)
(# 262 - 1967)

January 16, 1968



Honorable Robert A. Bryant
Prosecuting Attorney
Carroll County Courthouse
Carrollton, Missouri 64633

Dear Mr. Bryant:

This opinion is written to answer your question which you posed to us in the following form:

"Does the employment by the Prosecuting Attorney of the married daughter of a present County Court Judge for the job of secretary to the Prosecuting Attorney's Office, under the authority granted the Prosecuting Attorney by Section 56.245, RSMo, violate Article VII, Section 6 of the Constitution of the State of Missouri or any other nepotism or conflict of interest legislation as it might apply to the said County Court Judge?"

The young lady in question is married; lives apart from her father; and works only on a part-time basis.

The constitutional provision which you refer to (Article VII, Section 6, of the Missouri Constitution) reads as follows:

Honorable Robert A. Bryant

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

The term "nepotism" is defined in 66 C.J.S. 6, as follows:

"NEPOTISM. The bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee."

Section 56.245, RSMo Supp. 1965, reads as follows:

"The prosecuting attorney in counties of the third and fourth class may employ such stenographic and clerical help as may be necessary for the efficient operation of his office. The salary of any stenographer or clerk so employed shall be fixed by the prosecuting attorney with the approval of the county court to be paid by the county but such salary shall not exceed twenty-seven hundred dollars per year in third class counties and twelve hundred dollars per year in fourth class counties."

A close reading of the constitutional provision (supra) establishes that the appointing official who "names or appoints" must be related to the employee within the proscribed degree and it is that official who must make the appointment in order to constitute a violation of the constitution. Inasmuch as the prosecuting attorney names the secretary pursuant to Section 56.245, RSMo Supp. 1965, there is no act of nepotism committed by the county judge.

The question on the conflict of interest presents a more serious problem.

The conflict of interest statutes to which we refer are Sections 105.450 to and including 105.495, RSMo Supp. 1965.

Honorable Robert A. Bryant

Its obvious application arises out of the definition found in Section 105.450, subdivision (1), which provides:

"(1) 'Agency', any department, office, board, commission, bureau, institution or any other agency, except the legislative and judicial branches of the state or any political subdivision thereof including counties, cities, towns, villages, school, road, drainage, sewer, levee and other special purpose districts;"

Thus, these sections are made applicable to political subdivisions of the state to include counties.

However, an examination of these statutes (Sections 105.450 through 105.495, RSMo Supp. 1965) establishes there is no direct violation of these statutory provisions. Inasmuch as there is no private business transaction involved in which the officer (county judge) owns an interest or has an interest in any matter pending upon which the officer will be required to render a decision or pass judgment, we conclude there is no direct violation of the conflict of interest statutes.

Prior to the enactment of the conflict of interest statutes in 1965, contracts in which an "officer" had an interest were reviewed by courts and their validity determined by courts using as their yardstick what was referred to as "public policy." There is no reason to believe that the enactment of the "conflict of interests" statutes changed these principles of public policy nor the validity of their application.

Accordingly, your question should also be examined in this area to determine if there is a violation of these principles.

With facts and relationship of the parties in mind as we have heretofore set out, can there be any contractual relationship or interest sufficient in extent so as to vitiate the employment? We think not, in light of the facts. The young lady is employed by the prosecuting attorney who sets her salary. The money is appropriated by the county court to pay her salary.

The Missouri Supreme Court in Githens v. Butler County, 165 S.W.2d 650, 652, stated:

"[4] An indirect interest may be so remote as to not avoid a bargain between an official and the public body he represents, consequently when the interest is

Honorable Robert A. Bryant

not direct there is more reason for considering each case on its special facts. 6 Williston, Contracts § 1735; Thompson v. School Dist. No. 1, 252 Mich. 629, 233 N.W. 439, 74 A.L.R. 790."

Under the special facts of this case, we conclude that the interest of the parties herein would only be considered remote within the meaning of the Githens case which we have set out above.

CONCLUSION

It is the opinion of this office that:


(1) There is no act of nepotism in the appointing by the prosecuting attorney as his secretary the daughter of a county judge. The act of nepotism arises from the fact that the appointing officer who "names or appoints the employee" is, himself, related to the employee within the prohibited degree defined by statute;

(2) Inasmuch as there is no private business action which is involved where a prosecuting attorney appoints as secretary a woman who is the daughter of a county judge, there is no violation of the conflict of interest statutes found in Sections 105.450 to and including 105.495, RSMo Supp. 1965;

(3) The "principles of public policy" are not violated by the appointing by a prosecuting attorney as his secretary the daughter of a county judge.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

JAILS
CITIES, TOWNS, AND VILLAGES
COUNTIES
SHERIFFS
COOPERATIVE AGREEMENTS

A city and a county can jointly erect a common jail. A county can house city prisoners and charge the city therefor. The governing body of a county or the sheriff can contract with a town to use the town's jail.

February 22, 1968



OPINION NO. 267 - (1967)
50

Honorable Henry A. Keeler
Prosecuting Attorney of
Pettis County
Courthouse
Sedalia, Missouri

Dear Mr. Keeler:

We are in receipt of your request for an opinion, dated May 8, 1967, which is as follows:

"Would you be kind enough to furnish me with an opinion as to whether Pettis County and the City of Sedalia could jointly erect a common jail, with funds coming from each of the aforementioned units. If the County were to erect a jail, could they properly house City prisoners therein and charge the City therefor? If the City should erect a jail, could they house County prisoners therein and charge the County therefor?"

Your opinion request contains three separate questions:

1. If the County erects a jail, could they properly house City prisoners and charge the City therefor?
2. Can a City and a County jointly erect a common jail?

Honorable Henry A. Keeler

3. If the City should erect a jail, could they house County prisoners and charge the County therefor?

If a county erects a jail, it can properly house city prisoners and charge the city therefor. Section 98.010, RSMo 1959, expressly provides that if any city, town, or village has no suitable and safe place of confinement, the defendant may be committed to the common jail of the county by the mayor or police judge of such city, and it shall be the duty of the sheriff, if he has room, to receive and safely keep such prisoner. The city shall pay the board of such prisoner at the same rate allowed by law to the sheriff for keeping other prisoners in his custody.

A city and county can jointly erect a common jail. Section 71.300, RSMo 1959, expressly provides that an incorporated city or town and the county within which the city or town is located may erect and maintain jails for their joint use. When a city and county acquire real estate, title must be held as tenants in common, Section 70.240, RSMo 1959.

There is no statute expressly providing that a county prisoner can be confined in a city jail.

Article VI, Section 16 of the Constitution of Missouri provides as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Such section authorizes the legislature to pass laws respecting co-operative agreements for a common service. The law passed under this section states that the subject and purpose of any contract or cooperative action shall be within the scope of the powers of such municipality or political subdivision.

"Any municipality or political subdivision of this state, . . . may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, . . . for the planning, development, construction, acquisition or operation of any public improvement or facility,

Honorable Henry A. Keeler

or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality . . . and an elective or appointive official of another . . . political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." Section 70.220, RSMo 1959.

This office has held that the "common service" that may be contracted for includes any administrative service that the municipality or political subdivision has power to provide separately. Cantrell, Opinion No. 213, May 15, 1963; Holman, Opinion No. 230, March 29, 1966.

Providing an adequate jail is an administrative service. Therefore, it is a proper subject for a cooperative agreement.

Section 221.010, RSMo 1959, provides that a common jail shall be kept and maintained in each county of this state at the county seat. Section 77.140, RSMo 1959, provides that a third class city can maintain a jail. Therefore, a contract providing that a county can use a city jail is within the scope of the powers of Sedalia and Pettis County. The terms of the contract are for the parties to agree upon.

If the county court has contracted with a city to provide a jail, then that is the county jail. If the jail is insufficient, the sheriff has two alternatives provided by statute. The authors of Section 221.230 foresaw that in some counties there will be an insufficient jail or no jail, despite the requirement of Section 221.010. In that situation the sheriff decides where a prisoner will be jailed. Section 221.230 permits a sheriff to commit persons in his custody to the nearest jail of some other county and make it obligatory for the sheriff of some other county to receive such persons. The sheriff also has the alternative of employing a guard sufficient for the safekeeping of prisoners charged with a felony in his own county. Section 221.200 (2), RSMo 1959.

A sheriff can contract with a town to keep prisoners in a city jail. If the sheriff so contracts, this contract must be approved by the governing body of the county. Section 70.220, RSMo 1959.

Honorable Henry A. Keeler

The sheriff is responsible for prisoners committed to his custody and he is responsible for the conduct of a jailor he may appoint, Section 221.020, RSMo 1959. The Missouri Supreme Court has held that a suit may be maintained for breach of the sheriff's official bond on the grounds that the sheriff breached his duty to use ordinary care to prevent harm to prisoners in his custody, Miller v. Ousley, 52, 264, Supreme Court of Missouri, En Banc, September Session, 1967. This responsibility continues if the sheriff incarcerates prisoners in his custody in a city jail and a county cannot divest him of this responsibility by contract.

CONCLUSION

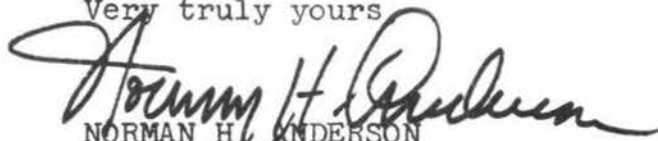
A city and a county can jointly erect a common jail.

A county can house city prisoners and charge the city therefor.

The governing body of a county or the sheriff can contract with a town to use the town's jail.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Deann Duff.

Very truly yours


NORMAN H. ANDERSON
Attorney General

OPINION NO. 55
NO. 290 (1967)
Answered by Letter--Peterson

February 8, 1968

Honorable Dan Bollow
Prosecuting Attorney
Shelby County
Shelbyville, Missouri 63469



Dear Mr. Bollow:

This letter is in response to your request for an opinion in which you informed us that the Clarence Nursing Home District is a duly organized district under Chapter 198, RSMo*, and located in Shelby and Macon counties. You further informed us that the voters of the district had failed to approve a nursing home bond issue. You stated that the board of directors was contemplating levying a fifteen cent property tax as authorized by Section 198.250 and accumulating the revenue until sufficient funds were available to build a nursing home facility.

In light of the above information, you asked the following questions:

"Can the directors of a nursing home district organized pursuant to Section 198 levy the 15¢ tax provided for therein for the purpose of accumulating funds to erect a nursing home facility and not for the purpose of maintaining an existing nursing home facility?

"If the directors of the district should find a suitable building for a nursing home what is the longest period of time to which they can commit the nursing home district to a lease and can this lease be a lease with an option to purchase?"

In answer to your first question above, enclosed you will find Opinion No. 351, dated December 2, 1965, issued to Senator William Baxter Waters. What is said therein regarding Section 206.110 is

*All citations herein are RSMo 1959, and RSMo Cum. Supp. 1967.

Honorable Dan Bollow

applicable and controlling on your first question. Section 206.110 is very similar in all respects, both in language and intent, to the powers granted a nursing home district under Section 198.300. A word of caution is in order, however, in that the board of directors certainly has the authority to accumulate funds but only for a reasonable period of time. In other words, we are not prepared to state what a reasonable period of time is; but, for example, one hundred years would be unreasonable, while a few years would probably not be unreasonable. Reasonableness, as always, will be a fact question and we would not be able to rule on that unless presented with a fact situation.

In answer to your second question above, please find enclosed a copy of Opinion No. 279, dated November 20, 1964, issued to Representative Thomas D. Graham. Also enclosed is a copy of Opinion No. 304, dated November 9, 1965, issued to The Honorable Gerald Kiser. There would be no prohibition against executing a lease with an option to purchase if the option contemplated a purchase only when the budgetary conditions would fall within the scope discussed in the Graham and Kiser opinions.

In conclusion, a nursing home district may, by action of its directors, levy the statutory tax and accumulate it for a reasonable amount of time for the purpose of constructing a nursing home facility. Other facilities may be leased for a period of time not to violate the provisions of Article VI, Section 26 (a), Constitution of Missouri, and such lease can contain an option to purchase if the language of the option meets the requirements of Article VI, Section 26 (a), supra.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

WAP/jlf

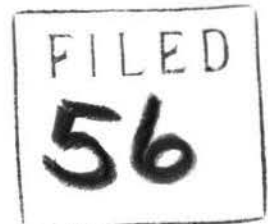
Enc.--Op. No. 351; 12/2/65; Waters
Op. No. 279; 11/20/64; Graham
Op. No. 304; 11/9/65; Kiser

ROADS AND BRIDGES:
STATE HIGHWAY DEPARTMENT:
PREVAILING WAGE LAW:

Contract for seal coating state highways with asphalt not subject to Prevailing Wage Law. Contract for application of layer of asphalt and aggregate three-eighths of inch thick subject to Prevailing Wage Law.

OPINION NO. 56 (1968)
305 (1967)

April 18, 1968



Honorable Thomas A. Walsh
State Representative - District 52
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Representative Walsh:

This is in answer to your request for an official opinion from this office asking whether the Prevailing Wage Law of Missouri applies to contracts let by the State Highway Department for "seal coating" asphalt highways and to contracts for the application to existing highways of a layer of asphalt into which an aggregate is rolled.

Section 290.210 RSMo Supp., 1967, defines "construction" and "maintenance work" under the Prevailing Wage Law of this State as follows:

"(1) 'Construction' includes construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair;

* * * * *

"(5) 'Maintenance work' means the repair, but not the replacement, of existing facilities when the size, type or extent of the existing facilities is not thereby changed or increased;"

"Construction" comes within the purview of the Prevailing Wage Law but "maintenance work" does not come within the purview of such Law.

It is our understanding that "seal coating" asphalt highways is accomplished by spraying liquid asphalt from a tank mounted on a carrier, the purpose being to fill in small cracks in the surface of

asphalt, which cracks if not filled in would cause the asphalt to deteriorate. In some instances fine material is placed on the sprayed surface to keep motor vehicle tires from picking up the asphalt during the short "drying" or "soaking" period.

We believe it to be clear that the mere application of liquid asphalt on an asphalt highway to fill small cracks which have developed in the surface of such road does not constitute construction, reconstruction, improvement, enlargement, alteration, painting, and decorating or major repair. We believe this would also be true even though some fine material is placed on top of the asphalt to prevent its being picked up by automobile tires during the soaking and drying process. Therefore a contract for such work is not a contract for "construction" within the meaning of the Prevailing Wage Law and the contract is not subject to the provisions of such Law.

It is our understanding that contracts for the application of a layer of asphalt and aggregate to an existing highway require the application of approximately three gallons of asphalt per square yard or about 3,000 gallons per mile and the application of 250 to 300 tons of aggregate per mile which is rolled into the asphalt layer producing a new uniform highway surface, the thickness of the layer of such asphalt and aggregate being about three-eighths of an inch.

It is our view that the application of a layer of asphalt and the rolling into such asphalt of aggregate so as to produce a new layer on an existing highway, such layer being about three-eighths of an inch in thickness and which produces a new highway surface constitutes "reconstruction" and "improvement" of such highway as such terms are used in the definition of "construction" found in Section 209.210 RSMo., Supp., 1967, and that such contract is subject to the Prevailing Wage Law of Missouri.

CONCLUSION

It is the opinion of this office that when a contract is let by the State Highway Department whereby liquid asphalt is sprayed from a tank for the purpose of sealing small cracks in the surface of an asphalt highway such work is not "construction" within the meaning of the Prevailing Wage Law of Missouri and the provisions of such Law are not applicable to such contract.

It is the further opinion of this office that a contract providing for the placing upon an existing highway of a layer of asphalt and aggregate, three-eighths of an inch in thickness is a contract providing for "construction" within the meaning of the Prevailing Wage Law and the provisions of the Prevailing Wage Law are applicable to such contract.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

A handwritten signature in cursive script, reading "Norman H. Anderson".

NORMAN H. ANDERSON
Attorney General

AUDITS: The accounts of the county treasurer of
COUNTY TREASURER: a second class county upon his retire-
AUDITOR: ment cannot be singled out for audit un-
COUNTY AUDITOR: der either Section 29.230, RSMo Supp.
COUNTIES: 1967, or Section 50.055, RSMo 1959. Such
audit can be made only under Section
55.160, RSMo 1959. An independent certified public account-
tant cannot be hired to audit only the accounts of the county
treasurer, but can be hired to audit all the accounts of the
county at a maximum cost of five thousand dollars under Sec-
tion 50.055.

OPINION NO. 57
(314 - 1967)

June 18, 1968



Honorable Robert P. Warden
Prosecuting Attorney
Jasper County
Courthouse - 6th and Pearl Streets
Joplin, Missouri 64801

Dear Mr. Warden:

This is in answer to your request for an opinion of this office on the question of whether the \$5,000 maximum payment that may be made under Section 50.055, RSMo 1959, is applicable when the county court of a second class county employs a firm of independent certified public accountants to make an audit of the county treasurer's office, after retirement of the county treasurer, because of certain alleged irregularities in his accounts.

Audits for a second class county are provided for in Sections 50.055 and 55.160, RSMo 1959, and Section 29.230, RSMo Supp. 1967.

Section 29.230 reads in part as follows:

"2. The state auditor shall audit any political subdivision of the state, including counties having a county auditor, if requested to do so by a petition signed by five per cent of the qualified voters of the political

Honorable Robert P. Warden

subdivision determined on the basis of the votes cast for the office of governor in the last election held prior to the filing of the petition. The political subdivision shall pay the actual cost of audit. No political subdivision shall be audited by petition more than once in any one calendar or fiscal year."

Section 50.055 reads as follows:

"The accounts of the county may be audited if the county court shall determine such an audit desirable or necessary, every odd numbered year within six months after the termination of the preceding fiscal year, either by a certified public accountant to be employed by the county court or by the state auditor, as said court may determine. If such audit is to be made by the state auditor, the state auditor shall be requested by the county court to make such audit, as provided by law. The audit herein provided shall also review the records of the receipts and disbursements and the property inventory of every officer or office of the county which receives or disburses money on behalf of the county or which holds property belonging to the county. Upon the completion of the investigation, the certified public accountant or the state auditor, as the case may be, shall render a report to the county court at the close of said period, together with a statement showing under appropriate classifications, the receipts and disbursements of the county during said period. The first audit, as provided by this section, may be made following the fiscal year of 1946, and such audit may be made every two years thereafter. The county court shall provide for the expense of such audit, which in no event shall exceed the sum of five thousand dollars, if made by a certified public accountant employed by the county court."

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Section 55.160 reads as follows:

"The auditor shall keep an inventory of all county property under the control and management of the various officers and departments and shall annually take an inventory of such property showing the amount, location and estimated value thereof. He shall keep accounts of all appropriations and expenditures made by the county court, and no warrant shall be drawn or obligation incurred without his certification that an unencumbered balance, sufficient to pay the same, remain in the appropriation account or in the anticipated revenue fund against which such warrant or obligation is to be charged. He shall audit the accounts of all officers of the county annually or upon their retirement from office. The auditor shall audit, examine and adjust all accounts, demands, and claims of every kind and character presented for payment against said county, and shall in his discretion approve to the county court of said county all lawful, true, just and legal accounts, demands and claims of every kind and character payable out of the county revenue or out of any county funds before the same shall be allowed and a warrant issued therefor by said court; and provided further, that whenever the auditor may think it necessary to the proper examination of any account, demand or claim, he may examine the parties, witnesses, and others on oath or affirmation touching any matter or circumstance in the examination of said account, demand or claim before he allows same; and provided further, that said auditor shall not be personally liable for any cost for any proceeding instituted against him in his official capacity. The auditor shall keep a correct account between the county and all county and township officers, and it shall be his duty to examine all records and settlements made by

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them for and with the county court or with each other, and said auditor shall, whenever he desires, have access to all books, county records or papers kept by any county or township officer or road overseer. Said auditor shall, during the first four days of each month, strike a balance in the case of each county and township officer, showing the amount of money collected by each, the amount of money due from each to the county, and the amount of money due from any source whatever to such office, and said auditor shall include in such balance any fees that may have been returned to said county court or to said auditor as unpaid and which since so having been returned shall have been collected."

Enclosed is a copy of Attorney General's Opinion No. 293, dated June 15, 1967, to the Honorable Haskell Holman, discussing Sections 50.055 and 29.230 and holding that these sections are alternative methods by which the State Auditor can be requested to audit a second class county. Section 50.055 is the only authority for the county court to employ a certified public accountant. Also enclosed is a copy of Attorney General's Opinion No. 327, dated July 20, 1967, to the Honorable Haskell Holman, holding that if the State Auditor is requested to make an audit under the authority of either Section 29.230 or 50.055 the county must pay the actual cost of the audit and it is only when the county employs a certified public accountant that there is a maximum cost of an audit. Therefore, if the county court were to hire an independent certified public accountant under the authority of Section 50.055 there is a maximum of five thousand dollars that can be paid.

However, there is a question of whether under either Section 29.230 or 50.055 an audit can be made of the accounts of only one county officer, in this case the county treasurer. Under Section 29.230 the county could be audited annually. Under Section 50.055 the accounts of the county could be audited every odd numbered year. It is our opinion that under each section an audit of all of the accounts of the county must be made and one account cannot be singled out. The only way that the accounts of the county treasurer can be singled out for audit is under the authority of Section 55.160.

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Therefore, the answer to your question is that an independent certified public accountant cannot be hired to audit only the accounts of the county treasurer. However, an independent certified public accountant can be hired to audit all the accounts of the county, but if this is done the maximum cost of the audit is five thousand dollars.

CONCLUSION

It is the opinion of this office that the accounts of the county treasurer of a second class county upon his retirement cannot be singled out for audit under either Section 29.230, RSMo Supp. 1967, or Section 50.055, RSMo 1959. Such audit can be made only under Section 55.160, RSMo 1959. An independent certified public accountant cannot be hired to audit only the accounts of the county treasurer, but can be hired to audit all the accounts of the county at a maximum cost of five thousand dollars under Section 50.055.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enclosures: Opn. No. 293/6-15-67/Holman
Opn. No. 327/7-20-67/Holman

LABOR:
WOMEN:
HOURS OF LABOR:
FEMALE EMPLOYEES:

Female employee of bank covered by
maximum hours of female employment law.

June 18, 1968

OPINION NO. 318
Opinion 58 (1968)

Honorable Jack Yocom
Prosecuting Attorney
Greene County
Springfield, Missouri 65802



Dear Mr. Yocom:

This is in response to your request for an opinion on the applicability of the female maximum hours of employment law to banking institutions. For convenience we set out in full the statute in question, Section 290.040, RSMo Cum. Supp. 1967).

"1. Hours of labor of female employees. No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the diverse kinds of establishments and places of industry, herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; provided, that operators of canning or packing plants in rural communities, or in cities of less than ten thousand inhabitants wherein perishable farm products are canned, or packed, shall be exempt from the provisions of this section for a

Honorable Jack Yocom

number of days not to exceed ninety in any one year, and operators of floral establishments shall be exempted from the provisions of this section on certain holidays, namely: Mothers Day, Valentines Day, Easter and Christmas and on occasions for funerals and weddings, not to exceed three days in any calendar week or a total of 30 days in any calendar year, and telephone companies shall be exempt from the nine hours during any one day provision of this section.

2. Nothing in this section shall be construed to apply to telephone companies serving under seven hundred fifty stations, or to telephone companies in cases of emergency." (Emphasis added)

We agree with the indications contained in your request that the key phrase of the statute is "public institution".

Initially we observe that remedial statutes are given a liberal construction and, more particularly, that hours of employment statutes are given a broad construction in furtherance of their beneficial purpose (United States v. Pitcairn, 23 F. Supp. 242 (ED Mo. 1938)). A more elaborate discussion of this principle of statutory construction is contained in an earlier opinion of our office regarding this same statute, a copy of which is herewith enclosed (Opinion No. 90, December 8, 1941, to Mr. Orville Traylor).

As originally enacted the prohibition on hours of female employment was as follows:

"No female shall be employed or permitted to work in any manufacturing or mercantile establishment, laundry or restaurant in any cities of this state which may now or hereafter contain more than 5,000 inhabitants before five o'clock in the morning or after ten o'clock in the evening of any day, nor for more than fifty-four hours in any one week. * * *" (Laws 1909, p. 616; Sec. 7815, RSMo 1909).

The statute was amended in 1913 to substantially its present form and particularly so as to include employment in a "public

Honorable Jack Yocom

institution, incorporated or unincorporated,..." (Laws 1913, Page 400). It is our opinion that the Missouri Assembly then intended the phrase "public institution" to include banks chartered by either the United States or the State and thereafter regulated by one or both of these governments (§362.420, RSMo 1959; L. 1915, p. 102).

A California Court has stated that banks, although organized and financed by private individuals for personal gain, are in a sense "public institutions" subject to legislative regulation, examination and control. (Franklin vs. Bank of America, 88 P. 2d 790, 796 [Cal.] To like effect, 9 CJS, Banks and Banking, §1, p. 28 and § 5, p. 32). Since 1915 there has been a legislative prohibition on the establishment of private, or unincorporated, banks in Missouri (Laws 1915, Page 157; now Section 362.015, RSMo 1959). Our Supreme Court has noted the substantial interest which the public has in all banks:

"* * *The banking business is coupled with great public interest. It is subject to strict regulation, visitation and supervision.
* * * * *

'Banks are in effect fiscal agents of the government. They are essential to the business interests of our state. They operate under government supervision. The public has a keen interest in their successful operation and in their facilities for public service. They aim to afford the public a place for the safe-keeping of one's money. While regulation must be and is strict and exacting, unreasonable and unjust rules inconsistent with the efficient and safe conduct of the bank are not to be imposed.' Rodgers v. Bankers' National Bank, 179 Minn. 197, loc. cit. 203, 229 N.W. 90, loc. cit. 92." (Lucas vs. Central Missouri Trust Company, 162 SW 2d, 569, 577, En banc 1942; 1.c. 577).

We feel that the characterization of banks today in Missouri, since the abolition of "private banks", can be expressed in the language of an early New York Court:

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"The proper phrase for a banker who exercises in his business no more than the rights and privileges common to all men, as distinguished from a bank or association or person who has taken advantage of the provisions of statutes, and by a compliance with the conditions of them as privileges not natural and common, is not 'individual banker'; it is 'private banker'. He is private in his business inasmuch as he may conduct it as he pleases within the law, and is not subject to visitation or scrutiny by the state; while those who have started a banking business under an enabling statute are public, inasmuch as the public has given them the right, and has the power to demand securities and have reports and to make inquiry into the business and how it is conducted." (People vs. Doty, 80 N. Y. 225, L.c. 233) Emphasis supplied.

In summary, we believe that a "liberal construction", or a construction that gives the words used their most extensive meaning but without doing violence to the language (82 C.J.S. Statutes, §§ 311, 388, pp. 530, 919-921), of the phrase "public institution" in Section 290.040 warrants the conclusion that banking institutions are included therein.

Had the Missouri legislature intended "public institutions" to mean those of a governmental nature we believe a different phrase could and would have been used. The legislature has, over the years, used a variety of statutorily defined phrases to describe governmental bodies, but in no instance that we can find have they so used or defined the phrase "public institution".

e.g.:

"Civil subdivision"	(L. 1921, 1st Ex. Sess., p. 131; now § 226.010 (1), RSMo 1959)
"Municipal Corporation"	(L. 1911, p. 362, § 232.010, RSMo 1949)
"Municipality"	(L. 1913, p. 556, now §386.020(16) RSMo 1959; L. 1921, 1st Ex. Sess. p. 131, now § 226.010(5), RSMo 1959;

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L. 1921, 1st Ex. Sess. p. 76;
now § 301.010(16), RSMo 1959;
L. 1951, p. 300, now § 99.320
(12), RSMo 1959; L. 1949, p.
602, now § 141.220(7), RSMo
1959; L. 1941, p. 493, now
§ 91.830(3), RSMo 1959)

"Political
Subdivision(s)"

(L. 1941, p. 490, now §70.120(2),
RSMo 1959; L. 1947, p. 401, now
§70.210(2), RSMo 1959; L. 1951,
p. 537, now §44.010(6), RSMo
Cum. Supp. 1967; L. 1943, p. 670
now §142.010(8); L. 1951, p. 788,
now §105.300(8), RSMo Cum. Supp.
1967; L. 1965, p. 227, §105.145(1),
RSMo Cum Supp. 1967)

"Public body"

(L. 1951, p. 300, now §99.320(15),
RSMo Cum. Supp. 1967)

"Taxing authority"

(L. 1923, p. 1029, now §141.220(14),
RSMo. 1959)

When referring to the State, or one or more of its departments
or agencies as an employer, the legislature has been un-
mistakably clear in its reference.

e.g.:

Voluntary retirement or health plans-

"Whenever the employees of any state department,
division or agency " (L. 1951, §33.103,
RSMo 1959)

State Merit System

"A system of personnel administration based on
merit principles.... is established for all
offices, positions and employees of the state
department of public health and welfare, the
state department of corrections, the personnel
division of the department of business and
administration and the division of employment
security of the department of labor and
industrial relations, except that the following
offices and positions of these agencies are not

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subject to this law

* * * * *

(7) Patients or inmates in State charitable, penal and correctional institutions who may also be employees in the institutions;

(8) Persons employed in an internship capacity in a state department or institution.....

(Section 36.030, 1959, L. 1945, p. 1157)

State Employees' Retirement System

" * * * * *

(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations.....

* * * * * " (Section 104.310, RSMo Cum. Supp. 1967; L. 1957, p. 706)

Workmen's Compensation

"1. The word 'employer' as used in this chapter shall be construed to mean:

* * * * *

(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation or 'quasi' corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance.

* * * * * " (§287.030, RSMo 1959; L. 1925, p. 379)

We are impelled to the conclusion that the legislature did not intend governmental employers to be within the statute, having in mind the rule of statutory construction that:

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute,

Honorable Jack Yocom

however general and comprehensive the language of the act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication." (82 CJS, Statutes, § 317, p. 554).


It was substantially for this reason that this office previously took the position that a state hospital was not a "public institution" and thus not within the female maximum hours of employment statute (See Annotations to VAMS, §290.040).

CONCLUSION

It is the opinion of this office that a female employee performing stenographic and clerical duties in a state chartered bank is subject to the maximum hours of female employment law. (Sec. 290.040, RSMo Cum. Supp. 1967).

The foregoing opinion, which I hereby approve, was prepared by my Assistant Louren R. Wood.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

CIRCUIT CLERKS:
COUNTY RECORDER:
COUNTY ASSESSOR:

Circuit clerk-recorder in third class
county not required under Section.
137.117 to notify county assessor
of court decrees in quiet-title suits.

OPINION NO. 62
342 (1967)

February 6, 1968



Honorable Peter H. Rea
Prosecuting Attorney
Taney County
Branson, Missouri

Dear Mr. Rea:

This is in reference to your letter in which you inquire whether the circuit clerk and ex officio recorder of deeds in a third class county are required under Section 137.117, RSMo 1959, to supply the county assessor with information concerning decrees of courts in quiet-title suits based on adverse possession.

Section 137.117, RSMo 1959, to which you refer provides:

"The circuit clerk and ex officio recorder of deeds of each county of the fourth class and of each county of the third class wherein the offices are combined, and the recorder of deeds of each county of the third class wherein the offices are separate, shall furnish the county assessor of his county, or the township assessors in counties with township organization, on or before the fifteenth day of each month a true and complete list of all real estate transfers completed in the county or townships, in counties with township organization, during the preceding month. The list so furnished shall contain the following information relating to each transfer:

- (1) The names of the grantor and grantee;
- (2) The consideration paid;
- (3) A description of the real estate transferred by the smallest legal subdivisions, or by smaller parts, lots or parcels, if

Honorable Peter H. Rea

sections and the subdivisions thereof are subdivided into parts, lots, or parcels as shown by plat duly recorded and if not so subdivided then by such description as will enable the assessor to find it, together with the number of acres transferred; and

(4) The book and page number where each deed is recorded." (Emphasis ours)

You state that Taney County is a third class county and the offices of circuit clerk and recorder are combined. In other words, the same officer is in charge of both offices. Under this section the circuit clerk and ex officio recorder of each county in the third class, wherein the offices are combined, is required to furnish the information to the county assessor regarding transfers of property that are recorded as provided in the above statute.

It is the view of this office that under Section 137.117, supra, the circuit clerk-recorder in a third class county where the offices of circuit clerk and recorder have been combined is to furnish information to the assessor regarding those deeds of conveyance that have been recorded in the recorder's office. This applies only to deeds of conveyances that are recorded and unless they are recorded he is not required to include them. It is our opinion that this statute does not apply to judgments, and decrees of a court in suits to determine or quiet title because the statute refers to "deeds" and to grantors and grantees.

A deed is a written instrument subscribed and acknowledged by the person executing the same by which property is conveyed. There must be a grantor and grantee in such instruments. Section 442.020, RSMo 1959; Seibel v. Higham, 216 Mo. 121, 115 S.W. 987; Words and Phrases, Vol. 11, Deed, p. 452.

A decree of court in quiet-title suits based on adverse possession does not have a grantor or grantee and is not a deed, so it does not come within the purview of Section 137.117, supra.

In view of our answer to this question it is unnecessary to consider the other questions submitted.


CONCLUSION

It is the opinion of this office that in the county of the third class where the office of circuit clerk and recorder have been combined, the circuit clerk-recorder is under no duty to furnish the county assessor with information concerning decrees of courts in quiet-title suits.

Honorable Peter H. Rea

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

April 30, 1968

Opinion No. 63

(343)

Answered by Letter -
Brannock

Honorable Raymond Howard
State Representative - 10th District
Missouri House of Representatives
705 Chestnut
St. Louis, Missouri



Dear Representative Howard:

We have your request for an official opinion of this office which is as follows:

"The legislature appropriated about \$300,000.00 to purchase land so that a building for trainable children could be constructed. This \$300,000.00 is part of a larger appropriation which includes money for a building. The State Board of Education at its last meeting voted to buy a large tract of land and pay for it by using (1) the above mentioned \$300,000.00, (2) \$350,000.00 from the School for the Blind Trust Fund and (3) \$600,000.00 to be requested from the next legislature. It plans to construct on this same land one or two buildings for the School for the Blind. The land involved is just across the street from the School for the Blind.

1. Is it legal to use School for the Blind Trust Fund to buy land for the normal operation of the School for the Blind?
2. It is permissible to commingle money in the School for the Blind

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Trust Fund with other moneys in order to serve a purpose in no way essentially related to the Blind as purchasing this land?"

The Constitution of Missouri, Article IX, Section 9(b) is as follows:

"The general assembly shall adequately maintain the State University and such other educational institutions as it may deem necessary."

The Legislature has established special schools under the management of the State Board of Education. One of these is the Missouri State School for the Blind, provided for in Section 178.010, RSMo Supp. 1967.

Section 178.047, RSMo Supp. 1967, is:

"The state board of education, whenever it deems it necessary for the best interest of the school or schools, may acquire land or other property by gift, purchase, eminent domain, or otherwise for the use and benefit of the Missouri School for the Blind at St. Louis. . . ."

Section 178.060, RSMo Supp. 1967, is:

"The state board of education may receive and administer any grants, gifts, devises, bequests or donations by any individual or corporation to the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton. Grants, gifts, devises, bequests or donations made for a specified use shall not be applied either wholly or in part to any other use."

Paragraph one of Section 178.070, RSMo Supp. 1967, provides that all funds derived from grants, gifts, donations or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise or bequest to or for the use of the Missouri School for the Blind or income received or earned on property may be deposited in the state treasury in a fund known as the "School for the Blind Trust Fund".

Paragraph three thereof is as follows:

Honorable Raymond Howard

"The moneys in the school for the blind trust fund or in the school for the deaf trust fund shall not be appropriated for the support of the schools in lieu of general state revenues but shall be appropriated only for the purpose of carrying out the objects for which the grant, gift, donation, devise or bequest was made as recommended by the state board of education."

It will be noticed in the foregoing paragraph three of Section 178.070, that the blind trust funds shall not be appropriated for the support of the school for the blind in lieu of general state revenues, but shall be appropriated only for the purpose of carrying out the purpose for which they were given to the fund. The Department of Education has advised us in writing, and has made present Trust files available to us for examination, and they state in writing that there are no specific directions contained in the conveyances from which funds were derived which were deposited and credited to said fund which specify the purpose for which said funds shall be expended.

It is the opinion of this office that money in the School for the Blind Trust Fund derived from conveyances to the fund which do not specify any purpose for which the funds may be used can be appropriated and expended by the Board of Education for the purchase of land and construction of buildings for the School for the Blind if request for funds from general revenue for such purchase has resulted in an appropriation from general revenue less than the Board has requested as necessary for such purchase and that such expenditures are for the normal operation of the School for the Blind.

The Department of Education advised this office in writing on November 20, 1967, and again on January 23, 1968, that "... there was never any intention to comingle School for the Blind trust funds and other state funds for the purchase of the land" Therefore, we believe it unnecessary to answer your second question.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

AB:1ch

STATE EMPLOYEES' RETIREMENT
SYSTEM:
LEGISLATURE:
RETIREMENT:

Increase in monthly retirement benefits as provided for in Senate Bill No. 360 of the 74th General Assembly, Section 104.390, RSMo Cum. Supp., 1967, is applicable to prior terms of office, served by present and former members of the legislature who are members of the state retirement system and eligible for future retirement, in computing the minimum retirement annuity of such members.

OPINION NO. 66-1968

September 12, 1968

Mr. Edwin M. Bode, Secretary
Missouri State Employees'
Retirement System
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Bode:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"I would like to request an official opinion from the Attorney General's Office in regard to Senate Bill 360. * * * My question is whether or not Senate Bill 360 should be applied retroactively to prior terms of office served by present and former members of the legislature who are still active members of the system, but will be eligible for retirement in the immediate future."

Senate Bill No. 360, which was an amendment of Section 104.390, RSMo Cum. Supp., 1965, provided that the minimum annuity of any member of the retirement system who had served six or more years as a member of the General Assembly and who met the conditions for retirement at or after normal retirement age, would consist of monthly payments made at the rate of \$30.00 (formerly \$25.00) multiplied by the number of biennial assemblies in which he had served. Therefore, the issue for our determination is whether the increase in monthly retirement benefits is to be applied so that prior terms of office served by present and former members of the legislature who are active members of the state retirement system and eligible for future retirement, will be considered in computing the minimum retirement annuity of such members.

Mr. Edwin M. Bode, Secretary

The leading authority on this issue is the case of State v. Missouri State Employees' Retirement System, 362 S.W. 2d 571. In this case, it was held by the Supreme Court of Missouri that a 1961 amendment to the 1957 statute permitting payment of increased benefits to retired members (emphasis ours) of the Missouri State Employees' Retirement System would require taking a portion of the fund existing when the amendment was passed to pay the increase and would impair a contract with active members in violation of the Constitution. Thus, it is clear that the increase in monthly retirement benefits does not apply to previously retired members of the General Assembly.

It is submitted that the factual situation as presented is distinguishable from the above case in that the present and former members of the legislature have not as yet retired, but are still active members in the state retirement system and continue to make contributions to the state retirement fund. In addition, there is authority to support the proposition that the status of an applicant for a state employees' retirement allowance must be determined by the provisions of the statute in effect when the application for the allowance is filed. See 81 C.J.S., States, Section 94.


Therefore, it is our belief that an active member of the retirement system who has contributed to the fund through the years is entitled to a retirement allowance in accordance with the statutory provisions presently in effect.

CONCLUSION

It is the opinion of this office that the increase in monthly retirement benefits as provided for in Senate Bill No. 360 of the 74th General Assembly, Section 104.390, RSMo Cum. Supp., 1967, is applicable to prior terms of office, served by present and former members of the legislature who are members of the state retirement system and eligible for future retirement, in computing the minimum retirement annuity of such members.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,


NORMAN H. ANDERSON
Attorney General



AGRICULTURE DEPARTMENT: The specific provisions of SB No. 77, 74th
HEALTH-BOARD OF: General Assembly, as to sanitation in slaugh-
STATUTORY CONSTRUCTION: terhouses must be regarded as an exception to,
MEAT INSPECTION: or qualification of, the general provision of
SLAUGHTERHOUSES: Chapter 196, RSMo 1959, and that by the enact-
ment of SB 77 the legislature intended to
place in the Department of Agriculture exclusive jurisdiction to pres-
cribe rules and regulations with respect to sanitary practices in all
commercial plants at which livestock or poultry are slaughtered, or at
which meat or meat products are processed for human consumption, and
did not intend to subject those who are so regulated to duplicate super-
vision by the Division of Health.

February 13, 1968

OPINION NO. 67 (1968)
356 (1967)

L. M. Garner, M. D.
Acting Director
Division of Health
Broadway State Office Building
Jefferson City, Missouri 65101

Dear Dr. Garner:

This is in answer to your request for an opinion as follows:

"The Seventy-Fourth General Assembly passed
Senate Bill No. 77 relating to livestock and
poultry inspection.* * *

We respectfully request your opinion as to
what responsibility the Missouri Division of
Health has under Section 192.020, and Chapter 196,
particularly Sections 196.070, 196.075, and
196.190."

Section 192.020, RSMo 1959, to which you refer is as follows:

L. M. Garner, M. D.

"To safeguard the health of the people of Missouri--It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state."

No comparable or corresponding provision is contained in SB NO. 77 and therefore SB No. 77 made no change in responsibility of the Division of Health under Section 192.020. However, a different situation is presented with respect to Chapter 196, relating to the inspection, manufacture and sale of food. Paragraph 1 of Section 196.045, RSMo 1949, provides:

"Authority for enforcement vested in division of health --1. The authority to promulgate regulations for the efficient enforcement of sections 196.010 to 196.120 is hereby vested in the division of health. The division shall make the regulations promulgated under said sections conform, insofar as practicable, with those promulgated under the federal act.

From the above it will be noted that the Division of Health is given authority to promulgate regulations with respect to Section 196.070 which provides in part as follows:

"Food, when deemed adulterated. -- A food shall be deemed to be adulterated:

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered

L. M. Garner, M. D.

adulterated under this subdivision if the quantity of such substance in such food does not ordinarily render it injurious to health; or

(2) If it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 196.085; or

(3) If it consists, in whole or in part, of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or

(4) If it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered diseased, unwholesome, or injurious to health;"

The preparation of meat as food brings it within the above provisions of Section 196.070 and under the authority of that Section, the Division of Health promulgated regulations with respect to sanitation in slaughterhouses. Such regulations were promulgated in 1960 and were in effect when SB No. 77 was enacted. Sections 2 and 3 of SB No. 77 provide:

"Section 2. All commercial plants at which livestock or poultry are slaughtered, or at which meat or meat products are processed for human consumption, shall be operated in accordance with such sanitary practices as are provided by this act and by the rules and regulations prescribed by the commissioner.

Section 3. 1. There is hereby created 'The Meats Section of the Veterinary Division of the Department of Agriculture'.

2. The commissioner shall appoint a graduate veterinarian as the head of the meat section.

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3. The head of the meats section shall enforce the rules and regulations prescribed by the commissioner, and shall perform such other duties as the commissioner and the state veterinarian deem necessary."

Thus, we have two legislative enactments on the same subject matter. Your question, therefore, presents a problem in statutory construction, inasmuch as it involves a determination whether the power of the Division of Health to make and enforce regulations relative to sanitation in slaughterhouses has been abrogated or limited by SB No. 77 which places such authority in the Commissioner of Agriculture.

The fundamental purpose in statutory construction is to ascertain and give effect to legislative intent. Therefore, the construction of SB No. 77 must be such as to effectuate the purpose of its enactment and the legislative intent. The question which concerns us here is whether the legislature, when it enacted SB No. 77, dealing comprehensively and specifically with sanitation in all commercial plants at which livestock or poultry are slaughtered or at which meat or meat products are processed for human consumption, intended to limit or supersede the regulatory power of the Division of Health as to that particular matter, or to leave it unimpaired and to lodge concurrent power, in many particulars, in a second agency, the Meats Section of the Veterinary Division of the Department of Agriculture. In Wright vs. J. A. Tobin Construction Company, 365 S.W. 2d 743, 1. c. 744, the Court said:

"[3,4] In ascertaining the legislative intent as expressed in a statute courts are aided by certain well established rules. One such rule is that in the construction of statutes it is presumed that the legislature is aware of the interpretation of existing statutes placed thereon by the states' appellate courts, and that in amending a statute or enacting a new one on the same subject it is ordinarily the intent of the legislature to effect some change in the existing law. If this were not so the legislature in amending a statute would be accomplishing nothing, and legislatures are not presumed to have intended a needless and useless act. See, State ex rel. M. J. Gorzik Corp. v. Mosman, Mo. Sup., 315 S.W. 2d 209."

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It must be presumed that the legislature was aware of the regulations promulgated by the Division of Health relative to sanitation in slaughterhouses, and by the enactment of SB No. 77 intended to effect some change with respect to the authority of the Division of Health to promulgate and enforce these regulations. In Gross vs. Merchants-Produce Bank, 390 S.W. 2d, 591, l.c. 598, the Court said:

"[9,10] It is the established rule of construction that the law does not favor repeal by implication and where there are two or more provisions relating to the same subject matter they must, if reasonably possible, be construed so as to maintain the integrity of both. State ex rel. Newton McDowell, Inc., v. Smith, 334 Mo. 653, 67 S.W. 2d 50. As stated in State ex rel. and to Use of George B. Peck Co. v. Brown, 340 Mo. 1119, 105 S.W. 2d 909, 911, 'Repeals by implication are not favored -- in order for a later statute to operate as a repeal by implication of an earlier one, there must be such manifest and total repugnance that the two cannot stand * * *.' It is also a rule of construction that where two statutes treat of the same subject matter, one being special (59.163) and the other general (443.460), unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as it comes within the special provisions. State ex rel. Newton McDowell, Inc. v. Smith, supra; State ex rel. Preisler v. Toberman, 364 Mo. 904, 269 S.W. 2d 753. * * *"

82 C.J.S. 369, Statutes, states as follows:

"General and special statutes should be read together and harmonized, if possible; but, to the extent of any necessary repugnancy between them, the special statute will prevail over the general unless it appears that the legislature intended to make the general act controlling."

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Chapter 196 is general in its terms applying to every building "* * *used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, restaurant, hotel, dining car, grocery, meat market, dairy, creamery, butter factory, cheese factory, or other place or apartment used for the preparation for sale, manufacture, packing, storage, sale or distribution of any food, * * *" Section 196.190. Standing alone this language is broad enough to include sanitation in slaughterhouses. Yet it is clear that by SB No.77 the legislature, as to sanitation in slaughterhouses, has specifically decreed that:

"All commercial plants at which livestock or poultry are slaughtered or at which meat or meat products are processed for human consumption shall be operated in accordance with such sanitary practices as are provided by this act and by the rules and regulations prescribed by the Commissioner."

This specific enactment manifests a legislative intent to except the particular function relative to sanitation in plants at which livestock and poultry are slaughtered from operation of the general provisions of Chapter 196. Otherwise, we would have an anomalous situation for the two acts cannot be reconciled. It is apparent in this case that a concurrent jurisdiction with respect to identical matters would present a situation of almost inescapable confusion and conflict for it would seem that one agency could prescribe hot water for sanitizing purposes, while the other agency with equal authority could prescribe cold water for the same purpose.

We have therefore, Chapter 196, a regulatory statute, general in character and broadly applicable to many subjects within a general class, namely food, and SB No. 77, also a regulatory statute, but special in character and applicable only to and dealing minutely with some of the particular subjects within the same general class, namely meat and meat products. No legislative intent is apparent to impose a duplicate and conflicting control upon those subject to regulations under this special act. In such circumstances the jurisdiction conferred by the special act must be exclusive as to matters covered by it, and as stated in *Gross vs. Merchants-Produce Bank*, supra:

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"The special act will prevail in its application to the subject matter as far as it comes within the special provision."

The subject matter of SB No. 77 is:

"All commercial plants at which livestock or poultry are slaughtered, or at which meat or meat products are processed for human consumption * * *"

SB No. 77 is specific in its application to the subject matter for it provides that these commercial plants "shall be operated in accordance with such sanitary practices as are provided by this act and by the rules and regulations prescribed by the commissioner." Sanitary practices prescribed by SB No. 77 include authority for the condemnation of "All meat found to be unwholesome or adulterated * * *" (Section 8) And the use of labels approved by the commissioner (Section 10).

Both Chapter 196 and SB No. 77 contain provisions that show that the legislative intent is to take cognizance of federal acts. Section 196.050 is as follows:

"Not to prescribe more stringent regulations than prescribed by federal act. -- In no event shall the said division of health prescribe or promulgate any regulation fixing or establishing any definitions or standards which are more rigid or more stringent than those prescribed by the federal act applying to any commodity covered by sections 196.010 to 196.120 and if any product or commodity covered by said sections shall comply with the definitions and standards prescribed by the federal act for such product or commodity, such product or commodity shall be deemed in all respects to comply with sections 196.010 to 196.120."

Section 14 of SB No. 77 provides:

"Any commercial plant at which livestock or poultry are slaughtered or meat or meat products are processed for human consumption shall be exempted by the commissioner from the inspection provisions of this act if he finds that it has federal inspection or other approved inspection."

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It is apparent from these provisions that the legislature has manifested a continuing intent to cooperate with the federal government to protect the consuming public from meat and meat food products that are adulterated or misbranded. The Wholesome Meat Act approved December 15, 1967, PL 90-201, 81 Stat. 854, 1.c. 895, provides in part:

"Sec. 301. (a) It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective. In furtherance of this policy--

(1) The Secretary is authorized, whenever he determines that it would effectuate the purposes of this Act, to cooperate with the appropriate State agency in developing and administering a State meat inspection program in any State which has enacted a State meat inspection law that imposes mandatory ante mortem and post mortem inspection, reinspection and sanitation requirements that are at least equal to those under title I of this Act, with respect to all or certain classes of persons engaged in the State in slaughtering cattle, sheep, swine, goats, or equines, or preparing the carcasses, parts thereof, meat or meat food products, of any such animals for use as human food solely for distribution within such State.

(2) The Secretary is further authorized, whenever he determines that it would effectuate the purposes of this Act, to cooperate with appropriate State agencies in developing and administering State programs under State laws containing authorities at least equal to those provided in title II of this Act; and to cooperate with other agencies of the United States in carrying out any provisions of this Act.

(3) Cooperation with State agencies under this section may include furnishing to the appropriate State agency (i) advisory assistance in planning and otherwise developing an adequate State program under the State law; and (ii) technical and laboratory assistance and training

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(including necessary curricular and instructional materials and equipment), and financial and other aid for administration of such a program. The amount to be contributed to any State by the Secretary under this section from Federal funds for any year shall not exceed 50 per centum of the estimated total cost of the cooperative program; and the Federal funds shall be allocated among the States desiring to cooperate on an equitable basis. Such cooperation and payment shall be contingent at all times upon the administration of the State program in a manner which the Secretary, in consultation with the appropriate advisory committee appointed under paragraph (4), deems adequate to effectuate the purposes of this section.

(4) * * * * *
(b) The appropriate State agency with which the Secretary may cooperate under this Act shall be a single agency in the State which is primarily responsible for the coordination of the State programs having objectives similar to those under this Act."

The Department of Agriculture is the state agency primarily responsible for the administration of the State Meat Inspection Law.

SB No. 77 contains provisions with respect to adulteration (Sec. 1, Para. 1) Labeling (Sec. 10) and sanitation in slaughterhouses at which livestock and poultry are slaughtered or at which meat or meat products are processed for human consumption, (Sec. 2). Certain provisions of Chapter 196 relating to food and drugs generally contain somewhat comparable or corresponding provisions with respect to adulteration (196.070), misbranding (196.075) and sanitation in slaughterhouses (196.190). However, in view of the specific provisions of SB 77 and in accordance with the rule announced in Gross vs. Merchants-Produce Bank:

"The special act will prevail in its application to the subject matter as far as it comes within those special provisions."

It follows, therefore, that the special act withdrew from the Division of Health the power to promulgate and enforce sanitary

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regulations regarding all commercial plants at which livestock or poultry are slaughtered or at which meat or meat products are processed for human consumption, and it increased the power of the Department of Agriculture to the same extent.

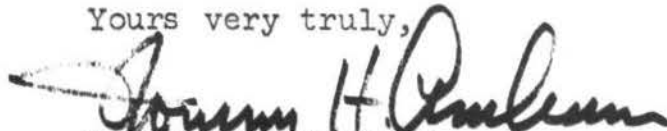
Otherwise, the two agencies and their respective functions remain the same. That is to say, the legislative intent in enacting SB No. 77 was to fit the particular subject matter and specific means provided by that act into the system of law designed to safeguard the health of the people of Missouri. The Division of Health is a component part of that system. Accordingly, any products prepared in slaughterhouses which are not classified as meat or meat products remain within the jurisdiction of the Division of Health for inspection purposes.

CONCLUSION

It is the opinion of this office that the specific provisions of SB No. 77 as to sanitation in slaughterhouses must be regarded as an exception to, or qualification of, the general provisions of Chapter 196, RSMo 1959, and that by the enactment of SB No. 77 the legislature intended to place in the Department of Agriculture exclusive jurisdiction to prescribe rules and regulations with respect to sanitary practices in all commercial plants at which livestock or poultry are slaughtered, or at which meat or meat products are processed for human consumption, and did not intend to subject those who are so regulated to duplicate supervision by the Division of Health.

The foregoing opinion, which I hereby approve, was prepared by my assistant L. J. Gardner.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

CIVIL DEFENSE:
FIRE PROTECTION DISTRICTS:
COUNTIES:

The Missouri Civil Defense Act (Chapter 44 RSMo.) envisions autonomous local civil defense organization in those political subdivisions defined by the law. Therefore, the county Civil Defense Agency has duties and responsibilities only within the areas of the county lying outside any of the statutorily defined political subdivisions having their own local organization for disaster planning.

OPINION NO. 375 (1967)
73 (1968)

August 1, 1968

Honorable William R. Antoine
State Representative, District 23
12101 Newbury Lane
Independence, Missouri 64052



Dear Representative Antoine:

This is in response to your request for an opinion on certain questions that you have relating to the Missouri Civil Defense Act. (Chapter 44, RSMo 1959, A.L. 1967) Your questions are as follows:

"1. Considering the governmental order of state, county and city or village, is a city political subdivision civil defense agency subordinate to a county political subdivision civil defense agency? If so, to what extent? If not, would this not negate and be inconsistent with Missouri's governmental structuring?

2. Was a duplication of activities intended by the statute considering the executive officer of any political subdivision appointing authority may be representative of, e.g., a city of 100 inhabitants, whereas, on the other hand, the executive officer of a county political subdivision appointing authority is responsible to the total county electorate?

3. What are the duties and responsibilities of a county civil defense agency respecting the total territorial and geographic area?

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4. Does the county civil defense agency have the right or the statutory responsibility to superimpose upon any lesser political subdivision a total county plan consistent with such county's function and would such lesser political subdivision inherently be bound to coordinate its plans and civil defense activities with every other lesser political subdivision under the county civil defense agency's direction?"

The statute authorizes each political subdivision of the State to establish a local organization for disaster planning (civil defense) in accordance with the state survival plan and program. (Section 44.080 (1)). Political subdivision is defined by the statute as "any county or city, town or village, or any fire district created by law" (Section 44.010 (6)). Local organization for civil defense is defined as "any organization established under this law by any county, city, town or village, to perform local civil defense functions" (Sec. 44.010 (5)). We think it entirely clear that the legislature has intended that either the County of Jackson, the City of Kansas City, or any towns, villages, or fire districts in Jackson County may, within their respective areas, adopt and carry out their own civil defense plans, and that none of these entities are placed in a position of superiority or subordination to the other in this respect. Cooperation between local governments in this area is certainly encouraged by the statute, and in the event of an emergency, the Governor is empowered to insure coordination of effort between the political subdivisions (Section 44.100, 1 (4) (a) (b).) The Governor is also, during emergencies, empowered to consolidate all civil defense efforts within the state (Sec. 44.100,2).

We do not consider that the foregoing arrangement is at all "inconsistent with Missouri's governmental structure", as you have suggested in your request.

"Constitutions and statutes providing for different types of government for the counties and cities of the state establish the policy of placing urban areas under city government and keeping rural areas under county government.
* * *" (62 C.J.S., Municipal Corporations, Section 114, Page 249)

Honorable William R. Antoine

"* * *Cities have been a chief factor in human progress. They exercise policy making authority and have legislative powers for their local government. It is inconsistent with the purposes of their creation that counties exercise jurisdiction over their affairs. Dual authority would tend to create confusion. This is especially true of an exercise of governmental police power. The indispensability of local self-government arises from problems implicit in the safety, order, health, morals, prosperity, and general welfare of thickly populated areas. *Heller v. Stremmel*, 52 Mo. 309; *State ex rel v. Leffingwell*, 54 Mo. 458; *Barton County v. Walser*, 47 Mo. 189; *Cook County v. Chicago*, 311 Ill. 234, 142 N.E. 512, 31 A.L.R. 442; 20 C.J.S., Counties §§ 1-3, p. 753; 43 C.J. p. 72, Municipal Corporations, Secs. 11-13, p. 186, Sec. 184; p. 247, Sec. 247, nn 73, 74. The jurisdiction of the city attaches and that of the county ceases when rural or county territory is annexed to a municipality. *St. Louis Gaslight Co. v. City of St. Louis*, 46 Mo. 121, 133; *Kurtz v. Knapp*, 127 Mo. App. 608, 106 S.W. 537; 43 C.J. 142, Municipalities, Secs. 117, 120. Within its authorized sphere of action a city has been termed 'a miniature state'. *Paulsen v. City of Portland*, 149 U.S. 30, 38, 13 S.Ct. 750, 753, 37 L. Ed. 637. This policy of government has received practical recognition by the General Assembly of Missouri." (*State ex rel Audrain County vs. City of Mexico*, 197 S.W. 2d 301 (1.c. 303))

We believe that fire protection districts were likewise intended to be independent of county government in regards to their civil defense operations.

See; *State ex rel Askew v. Kopp*, 330 SW2d 882 (Div1, 1960).

Cf; *St. Louis County v. City of Manchester*, 360 SW2d 638 (Banc 1960).

The legislature could have placed counties above the other political subdivisions, but we do not believe such was done. Rather, it is our opinion that the legislature chose to distribute among each

Honorable William R. Antoine

of the designated political subdivisions co-equal powers in the matter of "normal" (i.e.; non-emergency) disaster planning operations. (20 C.J.S. Counties §1, p. 753.)

You have inquired as to the relationship between a county and political subdivisions in such county insofar as Civil Defense functions are concerned. We do not therefore deem it necessary to discuss the question whether a fire protection district would be subordinate to or superior to a city insofar as territory which is located both within a city and a fire district is concerned.

CONCLUSION

It is the opinion of this office that the Missouri Civil Defense Act envisions autonomous local civil defense organization in those political subdivisions defined by the law. "Each local organization for disaster planning shall be responsible for the performance of civil defense functions within the territorial limits of its political subdivision, and may conduct these functions outside the territorial limits as may be required pursuant to the provisions of this law." Section 44.080 (1). Therefore, we answer your first, second and last questions in the negative and the third question by stating that the county Civil Defense Agency has duties and responsibilities only within the areas of the county lying outside any of the statutorily defined political subdivisions having its own local organization for disaster planning.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Louren R. Wood.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

June 24, 1968



Honorable Elmer J. Meyer
State Representative - District 26
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Meyer:

In your letter, you state the Trustees of the Firemen's Pension Fund of the City of Ferguson are having difficulty in determining how they can invest the funds of the pension system; and you inquire as to what types of investments are authorized for the funds of the Police and Firemen's Pension Funds established under the provisions of Section 86.583, RSMo.

With your request you submitted a memorandum prepared by the City Attorney of Ferguson in which he refers to certain specific statutes dealing with the investment of life insurance funds. Section 86.583, RSMo, authorizes cities of certain classifications to provide pensions for firemen and policemen in the manner therein provided. The City of Ferguson comes within the provisions of this statute.

Section 86.590, Mo. Supp., 1967, provides that the board of trustees of police and fire pension funds established under the provisions of Section 86.583 are authorized to invest and reinvest such funds subject to all the terms, conditions, limitations, and restrictions imposed by law upon life insurance companies of the State of Missouri in making and disposing of their investments.

You have asked what is meant by the term, "admitted assets," as such term is used in the statutes providing for investments by life insurance companies. The term, "admitted assets" as used in statutes relating to investments by life insurance companies means the assets of life insurance companies which the State Division of Insurance "admits" or accepts as assets in the statements of financial

condition of life insurance companies. "Admitted assets" include the cash possessed by a life insurance company and all of the investments of the company made in conformance with the statutory provisions for life insurance company investments but does not include furniture, equipment or automobiles of an insurance company.

If a life insurance company makes investments not authorized by the statutes providing for life insurance company investment, such investments are assets of the company but not assets that will be admitted or accepted by the Division of Insurance as "admitted assets" in the financial statement of the company.

It is our view that the State Department of Insurance has no jurisdiction or supervision over the Firemen's and Policemen's Pension Funds established under Section 86.583 and Section 86.590, that the only statutes pertaining to the State Insurance Department that must be considered by the Firemen's and Policemen's Pension Funds Trustees are those relating to the investments of the funds of life insurance companies, and that the trustees have authority to invest these funds as provided in statutes providing for life insurance company investments.

It is our view that Section 376.309, Mo. Supp., 1967, which deals with funds received by life insurance companies from retirement and pension programs established by them has no application to the investment of funds under Section 86.590.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

JUVENILES:
JUVENILE OFFICER:
SHERIFFS:

It is the duty of the sheriff, if he is convinced that a person in his custody is a juvenile, to report the matter directly to the juvenile court or to the juvenile officer together with all the information he has obtained, and this relieves the sheriff of any further duty insofar as this juvenile is concerned.

OPINION NO. 76
383 (1967)

October 1, 1968

Honorable W. D. Settle
Prosecuting Attorney
Howard County Court House
Fayette, Missouri 65248



Dear Mr. Settle:

Recently you requested an opinion from this office as follows:

"1. After the initial investigation discloses that suspects are juveniles, does the sheriff have any further duties, except reporting the matter to the juvenile officer?

"2. Does the sheriff owe any duty to round up juvenile suspects and their parents for interview by the juvenile officer? If so, under what authority can he be paid his mileage?"

Section 211.061, RSMo 1959, provides in part:

"1. When a child is taken into custody with or without warrant for an offense, the child together with any information concerning him and the personal property found in his possession, shall be taken immediately and directly before the juvenile court or delivered to the juvenile officer or person acting for him."

In State v. Arbeiter, Mo., 408 S. W. 2d 26, a juvenile had been convicted of murder and sentenced to life in prison. When he was arrested by city police officers, he was questioned by them without being advised of his constitutional rights such as his right to remain silent or to consult a lawyer or that any statement made by

Honorable W. D. Settle

him might be used against him. After being questioned by the city police he admitted his guilt and was then turned over to the juvenile authorities for further proceedings. In reversing this conviction the court stated, l.c. 29:

" * * * Once the police considered that they had sufficient reason to take Joe into custody, they were required to take him 'immediately and directly' to the juvenile court and it thereafter became the function of that agency to determine, in accordance with the procedures established by Chapter 211, whether or not sufficient grounds existed for the court's exercise of its jurisdiction."

The court held the statements made by the juvenile in response to the questions propounded by the police officer could not be used against the juvenile under these conditions. However, the court further stated it did not in this decision pass upon the question of spontaneous statements made by the juvenile prior to being taken before the juvenile court or juvenile officer or the statements made by the juvenile in response to questions after the juvenile had been placed in the custody of the juvenile court or the juvenile officer.

Section 211.411, RSMo, provides in part:

"2. It is the duty of police officers, constables, sheriffs and other authorized persons taking a child into custody to give information of that fact immediately to the juvenile court or to the juvenile officer or one of his deputies and to furnish the juvenile court or the juvenile officer all the facts in his possession pertaining to the child, its parents, guardian or other persons interested in the child together with the reasons for taking the child into custody."

Therefore, in response to your first question, it is our opinion that after the initial investigation by the sheriff discloses the suspects are juveniles, it is his duty to report the matter to the juvenile officer or after the juvenile is taken into custody either with or without a warrant, he must be taken immediately before the juvenile court or delivered to the juvenile officer.

Section 211.401, RSMo 1959, provides in part that the juvenile officer shall make such investigations and furnish the court with such information and assistance as the judge may require, take charge of children before and after the hearing as directed by the court, and perform such other duties and exercise such powers as the juvenile court may direct. It further provides:

Honorable W. D. Settle

"2. The juvenile officer is vested with all the power and authority of sheriffs to make arrests and perform other duties incident to his office."

If the offense is committed in the presence of a sheriff, he may take the juvenile into custody and shall "immediately and directly" take him before the juvenile court or turn him over to the juvenile officer together with all information he has obtained, and this relieves the sheriff of any further duties insofar as this juvenile is concerned. Thereafter, it is the responsibility and duty of the juvenile officer to assume custody and make such investigation thereafter concerning the juvenile as he deems necessary. From this point on the matter is a juvenile proceeding and not a criminal proceeding, and the sheriff is under no duty to make any investigation of this juvenile or rounding up the parents for the purpose of interview by the juvenile officer.

CONCLUSION

It is the opinion of this office that it is the duty of the sheriff, if he is convinced that a person in his custody is a juvenile, to report the matter directly to the juvenile court or to the juvenile officer together with all the information he has obtained, and this relieves the sheriff of any further duty insofar as this juvenile is concerned.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

JUN 17 1968

OPINION NO. ⁷⁸~~388~~
Answered by Letter
(Deann Duff)
388-1967

Honorable Lem T. Jones, Jr.
State Senator - 10th District
Missouri Senate
700 Waltower Building
Kansas City, Missouri 64106



Dear Senator Jones:

This letter is in response to your question: "May a trust company, which has complied with all applicable provisions of Section 363.700, RSMo 1949, as amended, serve as a plaintiff in a replevin action in the courts of record of this State without providing the sheriff with the bond described in Rule 99.03 of Missouri Rules of Civil Procedure, effective April 1, 1960?"

Section 363.700, RSMo 1959, provides that a trust company, with a certificate, which is issued by the State Finance Commissioner after the company deposits two hundred thousand dollars with him, shall be permitted to qualify as a fiduciary without giving bond and become sole guarantor or surety in or upon any bond required by law.

Honorable Lem T. Jones, Jr.

"Any company now doing business in this state or which may hereafter be organized under the provisions of this chapter to do business in this state, which shall make with the finance commissioner a deposit of two hundred thousand dollars, consisting of cash, or United States, state, county, municipal or other bond, or bonds, notes, or debentures secured by first mortgages or deeds of trust on unencumbered real estate in the state of Missouri, worth at least double the amount loaned thereon, or such other first-class securities as the said commissioner may approve, said bonds or securities not to be received or held at a rate above par, but if their market value is less than par, they shall not be held above their actual market value, and which shall satisfy said commissioner of its solvency, and shall have received the certificate of said commissioner that such company has made said deposit and has satisfied him of its solvency, it being hereby made the duty of said commissioner to issue such certificate in accordance with the facts, shall be permitted to qualify as guardian, curator, executor, administrator, assignee, receiver, trustee, or in any other fiduciary capacity, by appointment of any court, or under will, or depository of money in court, without giving bond as such, and become sole guarantor or surety in or upon any bond required by law to be given in any proceeding in law or equity in any of the courts of this state or other states or of the United States, any other statute to the contrary notwithstanding; and whenever such company shall exhibit to the court, judge, clerk or other officer, making such appointment, or whose duty it is to approve such bond, the certificate of the finance commissioner of the state of Missouri that such company has complied with the provisions of this section with respect to said deposit and proof of solvency, the court, or officer making such appointment, or whose duty it is to approve such bond, may appoint such company to such office or trust, and permit it to qualify as such without giving any bond, and permit such company to become sole guarantor or surety upon any such bond, without requiring any other surety therefor . . ."

Section 363.700, RSMo 1959.

Honorable Lem T. Jones, Jr.

Two different types of legal proceedings are covered by this statute. When a trust company acts as guardian, curator, executor, administrator, assignee, receiver, trustee, or in any other fiduciary capacity, it shall be permitted to qualify without giving bond as such. However, only when the trust company is acting in a fiduciary capacity can it avoid giving bond.

In other cases, a trust company may become sole guarantor or surety in or upon any bond required by law or equity. This provision of the statute is applicable when a bond must be given and does not purport to authorize a trust company to proceed without executing a bond. We believe that the statute makes clear that though the trust company may act as sole guarantor or surety upon the bond of a principal, the provisions authorizing the corporation to become sole guarantor or surety upon a bond do not apply when the bond is one that must be given by the trust company, in which case the corporation itself is the principal. In the replevin action in question, the trust company must execute the bond and the trust company is the principal and cannot act as the guarantor of its own bond.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

DD:fb

SCHOOL DISTRICTS:
SENATE BILL NO. 166:
(74th GENERAL ASSEMBLY)
CONSOLIDATION ELECTIONS:
BOUNDARY CHANGES:

Senate Bill No. 166 of the 74th General
Assembly does not prevent existing
school districts from changing their
boundaries under the provisions of
Section 162.431, RSMo Supp. 1965

OPINION NO. 80-68
NO. 392 (1967)

January 23, 1968



Honorable Dick B. Dale
State Representative- 83rd District
Missouri House of Representatives
Richmond, Missouri 64085

Dear Representative Dale:

This official opinion is issued in response to your request for a ruling. You inquire as to whether or not Senate Bill No. 166 of the 74th General Assembly prevents existing school districts from modifying their boundaries under Section 162.431, RSMo Supp. 1965.

House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill No. 166 of the 74th General Assembly as truly agreed to and finally passed contains the following provision:

"Section 6. On the effective date of this act all proceedings of whatsoever nature in school districts throughout the state to organize new districts pursuant to or growing out of sections 162.211 and 162.221, RSMo Supp. 1965, shall cease, and each district shall retain the organization and boundaries that it has at the time this act takes effect, and no further action shall be taken pursuant to such sections until after the state plan developed by the school district reorganization commission has been submitted to the state board of education and, with its recommendations, transmitted to the general assembly but, in no event, until after October 15, 1969."

Sections 162.211 and 162.221, RSMo Supp. 1965, which are cited in Section 6 of Senate Bill 166, provide for the organization

Honorable Dick B. Dale

of six-director school districts. The proceeding is initiated by petition of twenty-five voters of the proposed district. These two sections are basically the same as the statutes providing for the organization of city and consolidated districts under the former statutes, viz. Sections 165.263 to Section 165.280, RSMo 1959. In fact Sections 162.211 and 162.221 are still commonly referred to as the "Consolidation Laws". These sections provide only one of several types of procedures for changing the organization or boundaries of school districts.


Section 162.431, RSMo Supp. 1965, sets forth the procedure for changing boundaries between two existing school districts. This section is not mentioned in Section 6 of Senate Bill 166 nor is there any reason to infer that the General Assembly intended to include in Section 6 other types of procedures for changing school district territory besides Sections 162.211 and 162.221.

CONCLUSION

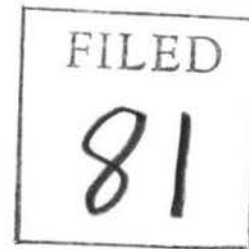
Therefore, it is the opinion of this office that Senate Bill 166 of the 74th General Assembly does not prevent existing school districts from changing their boundaries under the provisions of Section 162.431, RSMo Supp. 1965.

The foregoing opinion which I hereby approve was prepared by my Assistant, Louis C. DeFeo, Jr.

Yours truly,


NORMAN H. ANDERSON
Attorney General

May 13, 1968



OPINION NO. 81
395 (1967)
Answered by letter-Mansur

Honorable Joe J. Taylor
Prosecuting Attorney
Pemiscot County
Caruthersville, Missouri 63830

Dear Mr. Taylor:

This is in reply to your request for an opinion from this office on whether Supreme Court Rule 51.06, which requires an application for a change of venue and disqualification of the judge to be joined together in a civil case after the case is set for trial, also applies to criminal cases.

Supreme Court Rules 30.01 to 30.16 inclusive, defines the procedure to follow for a change of venue and disqualification of a judge in a criminal case. Supreme Court Rule 36.01 provides that the rules of criminal procedure governs in all criminal cases.

You state that you have been unable to find any rule in the rules of criminal procedure comparable to Rule 51.06 governing civil cases. Likewise, we have been unable to find any Supreme Court rule requiring the application for a change of venue and disqualification of the judge in a criminal case to be joined in one application.

It is the opinion of this office that Supreme Court Rule 51.06 does not apply to criminal cases; and in the absence of a Supreme Court rule, separate applications may be made for a change of venue and for the disqualification of the judge. *State v. Myers*, 14 S. W. 2d 447.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

MM:maw

PURCHASING AGENT:
STATE HIGHWAY COMMISSION:
STATE PARK BOARD:
STATE CONSERVATION COMMISSION:

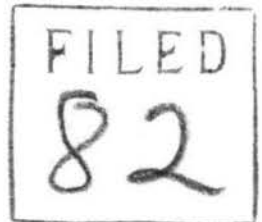
1. The State Purchasing Agent Law does not apply to purchases made by the University of Missouri.
2. The State Purchasing Agent Law applies to purchases made by departments including state colleges from non-appropriated funds.

3. The State Purchasing Agent Law does not apply to purchases made by a department under statutes now in effect or which may be enacted in the future giving a department specific authority to contract or purchase directly from a seller.

4. The State Purchasing Agent Law does not apply to leases or purchases of land by the State Conservation Commission, the State Highway Commission or the State Park Board.

NOTE: This opinion is amended by Op. No. 125, 1974.
Such opinion must be sent with copies of this opinion.

WITHDRAWN



OPINION NO. 82

October 9, 1968

Honorable E. J. Cantrell
State Representative - District 33
Missouri House of Representatives
St. Louis County
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Cantrell:

This is in answer to your recent opinion request which reads as follows:

"1. Does the State Purchasing Act (Chapter 34) apply to purchases by state departments and agencies (including state colleges) from funds derived from sources other than funds appropriated by the Legislature (such as funds derived from student fees)?

"2. Does the State Purchasing Act (Chapter 34) apply to all purchases by constitutional agencies such as the Highway Commission, Conservation Commission, University of Missouri, etc.?

"3. Do the constitutional agencies such as the ones referred to above have authority to establish purchasing offices independent and separate

Honorable E. J. Cantrell

from the State Purchasing Agent and if so, what statutes apply to establish and regulate such procedures?"

Your first question is whether the State Purchasing Act applies to state colleges insofar as non-appropriated funds are concerned.

Section 34.010 (3) RSMo., provides as follows:

"3. The term 'department' as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

Obviously a state college is not a part of the legislative or judicial departments and is therefore within the definition of "department" as used in Section 34.010.

It is our view that the State Purchasing Act does apply to purchases by the state colleges including purchases from funds not appropriated by the General Assembly.

On December 6, 1933, an official opinion was rendered to Honorable George C. Johnson, by the Attorney General holding that the State Purchasing Act was inapplicable to purchases made from funds not appropriated by the Legislature.

An opinion rendered under date of January 19, 1934, to W. W. Parker held that the State Purchasing Act was inapplicable to non-appropriated funds of state colleges.

The holdings in both of these opinions were based upon the provisions found in Section 4 of the State Purchasing Agent Act, Laws of Missouri, 1933, Page 410. Such Section provided that the Purchasing Agent should not furnish supplies to any department without first securing a certification from the State Auditor that an unencumbered balance remained in the appropriation to which the purchase was to be charged. Relying on such provision, the opinions held that the State Purchasing Agent had no authority to make purchases for state departments including state colleges from funds not appropriated by the Legislature.

Section 4 of the State Purchasing Agent Act was repealed, Laws of Missouri, 1943, Page 1004, and Section 14592 enacted in lieu thereof, such Section providing that the Purchasing Agent should not furnish supplies to any department without first securing a certification from an official of the department that an unencumbered balance remained in the appropriation to which the purchase was to be charged.

The 1933 and 1934 opinions, of course, were unchanged by the amendment to such statute because the certification though made by a department official instead of the Auditor, could apply only to appropriated funds.

Honorable E. J. Cantrell

However Section 14592, Laws 1943, Page 1004, was repealed by Laws 1945, Pages 1420 and 1421, and there is now no requirement that the Purchasing Agent secure the certification of any officer that there are unexpended funds in an appropriation before making purchases for a department.

Section 34.030 RSMo, provides as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."
(Emphasis ours)

In view of the clear unequivocal provisions of Section 34.030 RSMo, and the repeal of Section 14592 Laws 1943, Page 1004, it is our view that at present, all purchases by state colleges from non-appropriated as well as appropriated funds are to be made under provisions of the State Purchasing Agent Law.

We are, therefore, withdrawing the January 19, 1934, opinion rendered to W. W. Parker and are withdrawing the December 6, 1933, opinion rendered to George C. Johnson, insofar as such opinions hold that the State Purchasing Agent Law does not apply to purchases by state agencies from non-appropriated funds.

Your second question asks whether the Purchasing Agent Law applies to purchases by the University of Missouri, the State Highway Commission and the Conservation Commission.

We are enclosing a copy of an official opinion rendered under January 29, 1934, to Orville M. Barnett. Such opinion holds that the State Purchasing Agent Law is not applicable to the University of Missouri. Such opinion also holds that the State Purchasing Agent Law is not applicable to purchases from non-appropriated funds. As stated above, this latter holding, we believe to be incorrect under the present State Purchasing Agent Law. However, we believe such opinion to Mr. Barnett still to be correct in its holding that the State Purchasing Agent Law is not applicable to purchases by the University of Missouri because of the provisions of Section 9 (a) of Article IX of the Constitution of Missouri providing that the government of the State University shall be vested in the Board of Curators. Such opinion correctly holds that the constitutional provision exempts purchases by the University from the State Purchasing Agent Law. Such holding is also made in the opinion rendered by the Attorney General under date of December 6, 1933, to George C. Johnson.

The 1933 opinion relying on the case of State ex rel vs. Smith 67 SW2d 50, holds that insofar as supplies necessary to be used by the State Highway Commission in the construction of state highways

Honorable E. J. Cantrell

and supplies incident thereto are concerned, the State Highway Commission is exempted from the State Purchasing Agent Law. We believe that such 1933 opinion correctly holds that purchases by the State Highway Commission of supplies necessary in the construction of state highways and supplies incident thereto are not within the purview of the State Purchasing Agent Law. We enclose a copy of such opinion.

An official opinion was rendered by the Attorney General under date of October 18, 1937, to George Blowers holding that the State Purchasing Agent Law is applicable to purchases by the State Conservation Commission. We believe such opinion is correct in so holding. We are enclosing such opinion.

The State Park Board under provisions of Section 47 of Article III of the Constitution of Missouri has been given power to expend appropriations for the acquisition, supervision, operation, maintenance, development, control, regulation and restoration of State Parks and State Park property. However, it is our view that such authority does not exempt the State Park Board from the operation of the State Purchasing Act insofar as, purchases of personal property generally are concerned. It is therefore, our view that purchases of personal property by the State Park Board are subject to the State Purchasing Law.

However, purchases by departments of the state government are not subject to the State Purchasing Law when such purchases are made by authority of statutes now in effect or which may be enacted in the future which provide that the department is specifically given power and authority to contract and purchase directly from the seller.

It should be pointed out that Section 34.030, Supra, exempts from the purview of the State Purchasing Agent Law, leases and purchases of real estate when the department involved has constitutional powers in this regard. Under the provisions of Section 41, Article IV of the Constitution of Missouri, the Conservation Commission is given such power. Under the provisions of Section 30, of Article IV of the Constitution, the State Highway Commission is given such power. Under the provisions of Section 47, of Article III, the State Park Board is given such power. Therefore, leases and purchases of real estate by the Conservation Commission, the State Highway Commission and the Park Board are not within the purview of the Purchasing Agent Law.

Your third question inquires whether agencies which do not come within the State Purchasing Agent Law have authority to establish purchasing offices and if so, what statutes apply to the regulation of such purchases.

We find no statutes specifically setting out the procedure to be followed in making purchases by state agencies which purchases are not subject to the State Purchasing Agent Law.

Honorable E. J. Cantrell

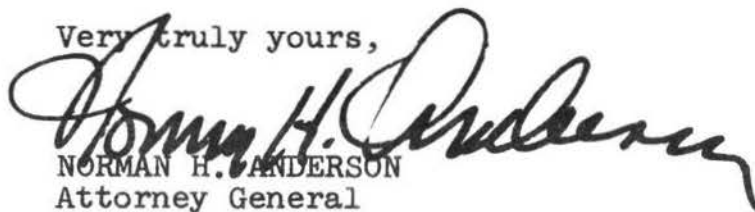
CONCLUSION

It is the opinion of this office that:

1. The State Purchasing Agent Law does not apply to purchases made by the University of Missouri.
2. The State Purchasing Agent Law applies to purchases made by departments including state colleges from non-appropriated funds.
3. The State Purchasing Agent Law does not apply to purchases made by a department under statutes now in effect or which may be enacted in the future giving a department specific authority to contract or purchase directly from a seller.
4. The State Purchasing Agent Law does not apply to leases or purchases of land by the State Conservation Commission, the State Highway Commission or the State Park Board.

This opinion which I hereby approve was prepared by my assistant Mr. C. B. Burns, Jr.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Encl: Opinions

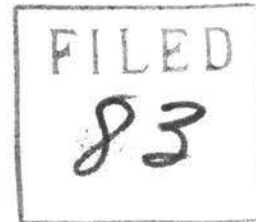
January 29, 1934
Orville M. Barnett

December 6, 1933
George C. Johnson

October 18, 1937
George Blowers

August 20, 1968

Honorable George W. Parker
State Representative
District 120, Boone County
507 E. Rollins Street
Columbia, Missouri 65201



Dear Representative Parker:

We acknowledge your request for an opinion on the following questions:

"1. Prior to the General Election of November, 1968, who are the members of the Congressional District Committee? That is, are the new Congressional Districts in effect as of now for this purpose? If the old districts are now in effect, when will the new districts take effect so far as these district committees are concerned?

"2. I believe you have concluded previously that the membership of the District Political Party Committee is made up of the county chairman and vice-chairman of each county wholly within the district the chairman and vice-chairman of each legislative district lying wholly within one county, and the ward or township committeemen and women of a ward or township lying in part or in whole within the district. I am thinking specifically of the membership of the 8th Congressional District in view of the townships from St. Louis County that are in the new district."

As for your first question, it is our opinion that the Congressional districts created by the 73rd General Assembly in 1965 (Laws 1965, p. 250), remain in effect for purposes of selection of party committees until the selection of committee members

Honorable George W. Parker

after the primary election this year. We believe that the legislative scheme clearly envisions reorganization of party committees at all levels not more often than every two years, or from primary election to primary election. There is no reason to believe that the legislature, by establishing new Congressional districts in 1967, so as to comply with the one-man one-vote requirement of the Federal Constitution (Chapter 128, RSMo. Supp. 1967) in any way intended to cut short the terms of office of all committee members duly elected or selected following the 1966 primary election.

In light of our treatment of your first question, your second question necessarily pertains only to the make-up of the party committees organized subsequent to the 1968 primary election. At such time, under the provisions of Section 120.810, RSMo. 1959, we believe the 8th Congressional District committee members will include:

(1) The Chairman and Vice-Chairman of County Committees of all counties lying wholly within the new 8th Congressional District. Sections 120.800 and 120.810(2), RSMo. 1959, provide that county committee's chairman and vice-chairman shall be members of the congressional committee.

(2) The Chairmen and Vice-Chairmen of all legislative districts from counties containing at least two such districts, which in this case are the counties of Boone and Jefferson. Section 120.810(1), RSMo. 1959, provides for officers of legislative districts in counties containing more than one legislative district and Section 120.810(2), RSMo. 1959, provides that the chairman and vice-chairman of each of such legislative districts shall be members of the Congressional Committee.

(3) The committeemen and committeewomen from each of the townships in St. Louis County which are in whole or in part located within the 8th Congressional District are members of the district committee by virtue of the provisions of Section 120.810(4), RSMo. 1959. Under the provisions of Section 128.283, RSMo. Supp. 1967, all of Concord and Meramec townships and a portion of Bonhomme township of St. Louis County are within the 8th Congressional District; and therefore those committeemen and committeewomen are members of the 8th Congressional district committee.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

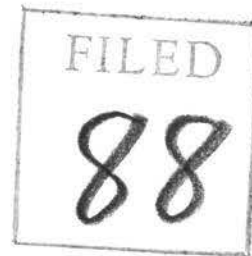
WLC:rs

PROBATE COURT: The Probate Court of Scott County must
MENTAL ILLNESS: grant a reexamination on a petition for
release from commitment from the State
Hospital in Fulton when the petition is filed by one found
to be mentally ill by the Probate Court of Scott County
under Section 202.807, RSMo 1959.

OPINION NO. 88
(411 - 1967)

June 25, 1968

Honorable Fielding Potashnick
Prosecuting Attorney
Scott County
P. O. Box 459
Sikeston, Missouri



Dear Mr. Potashnick:

This is in reply to your request for an official opinion asking essentially whether the Probate Court of Scott County is required to take any action on a petition for release of a patient from commitment from the State Hospital at Fulton when filed by one declared incompetent by the Probate Court of Scott County under Section 202.807, RSMo 1959.

In reply thereto, Section 202.837, RSMo 1959, is thought to be directly in point and is set out below:

"Any patient hospitalized pursuant to section 202.807 shall be entitled to a reexamination of the order for his hospitalization on his own petition, or that of his legal guardian, parent, spouse, relative, or friend, to the probate court ordering his hospitalization. Upon receipt of the petition, the court shall conduct or cause to be conducted by a special commissioner proceedings in accordance with such section 202.807."

Honorable Fielding Potashnick

The above section states essentially that any patient hospitalized under Section 202.807, as the facts indicate was the case here, shall be entitled to a reexamination of the order of hospitalization on his own petition, and the hearing shall be conducted in the manner prescribed in Section 202.807.

Clearly then, Section 202.837 requires that the individual in question be reexamined and the Probate Court of Scott County is required to provide him with a hearing as prescribed in Section 202.807 forthwith.

CONCLUSION

Therefore, it is the opinion of this office that the Probate Court of Scott County must grant a reexamination on a petition for release from commitment from the State Hospital in Fulton when the petition is filed by one found to be mentally ill by the Probate Court of Scott County under Section 202.807, RSMo 1959.

This opinion, which I hereby approve, was prepared by my assistant, L. Michael Lorch.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

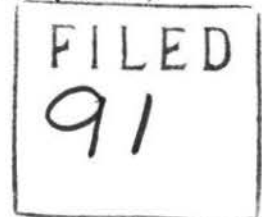
PUBLIC WATER SUPPLY
DISTRICTS:
WATER CODES:
ST. LOUIS COUNTY:

Public Water Supply District No. 1 in St. Louis County, including only unincorporated territories of the county, organized under Sections 247.010 to 247.220, RSMo 1959, can set up plumbing code regulations which are incident and necessary to the operation of the water district. However, such regulations cannot abrogate or contradict any of the provisions of the existing county plumbing code which has been adopted by the St. Louis County Council pursuant to the Constitutional Charter of St. Louis County and Sections 341.090 to 341.220, RSMo 1959.

OPINION NO. 91
NO. 420 (1967)

February 6, 1968

Honorable Eric F. Fink
Representative--46th District
St. Louis County
1325 Froesel Drive
Ellisville, Missouri 63011



Dear Representative Fink:

This is in response to your letter of October 6, 1967, requesting an opinion from this office concerning St. Louis County Public Water Supply District No. 1. The facts are as follows:

Public Water Supply District No. 1, organized under the provisions of Chapter 247, is in the unincorporated part of St. Louis County and was formed to provide public water service for areas that had previously relied on private water supplies because they were not served by the St. Louis County Water Company. St. Louis County has an office of Plumbing and Sewer Inspection established pursuant to the provisions of the Charter for St. Louis County and Sections 341.090 to 341.220, RSMo 1959. That office has the responsibility of issuing permits before any construction, alteration or repairs can be made on public or private water and sewage systems and of enforcing the plumbing code adopted by the St. Louis County Council. The plumbing code contains regulations relating to the operation, installation and inspection of water and sewer systems. This code governs water and sewer facilities in all unincorporated areas of St. Louis County and in those municipalities which do not have their own regulations governing plumbing, sewer and water regulations.

Honorable Eric F. Fink

Public Water Supply District No. 1 will buy water from the St. Louis County Water Company but they will have their own system of distribution facilities and waterworks. The water district wants to set up a complete plumbing code which would include inspection provisions, designation of types of construction material to be used, issuance of permits and all else pertaining to the operation of the water district. The question is, can the board of directors of the water district set up their own plumbing code under Sections 247.010 to 247.220, RSMo 1959, or must they follow the plumbing code presently established for St. Louis County by the County Council?

Public water supply districts are formed under the authority of Chapter 247, RSMo 1959. Section 247.020 states that these districts " * * * shall have and be invested with all the powers conferred upon them by the provisions of Sections 247.010 to 247.220 and no other." The powers of the water district are limited to those conferred by the relevant sections of Chapter 247. If the district has power to draw up a plumbing code, that power must come either expressly or impliedly from these statutory sections.

Section 247.050, RSMo 1959, sets forth the powers of public water supply districts. Those most relevant to our question are found in the following subsections:

"(5) To build, acquire by purchase or otherwise, enlarge, improve, extend and maintain a system of waterworks, including fire hydrants;

* * * * *

(8) To lease, acquire and own any and all property, equipment and supplies needed within or without the district in the successful operation of a waterworks system;

* * * * *

(10) To acquire by purchase or otherwise, a system of waterworks, and to build, enlarge, improve, extend and equip such system for the uses and purposes of the district;

* * * * *

Honorable Eric F. Fink

(13) To purchase equipment and supplies
needed in the operation of the water system
of the district; * * *

* * * * *

(15) To sell and distribute water to the
inhabitants of the district and to consumers
outside the district, delivered within or at
the boundaries of the district;

* * * * *

(17) To make general rules and regulations
in relation to the management of the affairs
of the district. (Emphasis added)

A water district is designated as a political corporation in the statutes and can be considered to be a municipal corporation in the broad sense which is sometimes attributed to that term. State vs. Kansas City Power and Light Company, 145 S.W. 2d 116. As a general rule, municipal corporations have powers which are expressly granted them and also those which are incidental to the powers expressly granted and absolutely essential to the purposes of the corporation. State vs. North Kansas City, 228 S.W. 2d 762. Section 247.050, RSMo 1959, and other sections which relate to the power of county water districts, make it clear that the water district board of directors is to have control of all facets of the water district's operation. It is evident that the board of directors has a wide range of responsibility in making sure that the operations of the water district function smoothly. On this point, we hold that a public water supply district does have power to make reasonable rules and regulations in the management of the water district.

Sections 341.090 to 341.220, RSMo 1959, are designated as a "Uniform Plumbing Code" which may be adopted by counties of the first class. Section 341.130, RSMo 1959, states:

"For the purpose of promoting health, safety and the general welfare and to carry into effect the purposes and provisions of sections 341.090 to 341.220, the county court is hereby empowered to adopt by order rules and regulations for the installations and inspections of all public or private water or plumbing facilities and appurtenances and all installations relating thereto, * * * ."

Honorable Eric F. Fink

St. Louis County, which has a constitutional charter form of government, has a county council instead of a county court. In addition to having power stemming from the constitutional charter which an ordinary county court does not have, the county council also exercises the normal statutory powers of a county court. Readey vs. St. Louis Water Company, 352 S.W. 2d 622.

St. Louis County has established plumbing code regulations pursuant " * * * to the provisions of the Charter for St. Louis County and Chapter 341, R.S.Mo., 1959". Section 1103.030, Revised Ordinances of St. Louis County. Neither such code nor the provisions of Chapter 247 exempt public water supply districts from the effect of the county water code regulations. Those installing a water system in a water supply district in St. Louis County have to get a permit from the Office of Plumbing and Sewer Inspection and have to abide by the rules and regulations set forth in the county plumbing code. The county plumbing code contains extensive rules and regulations governing the construction, installment and repairs of plumbing facilities. It also provides for inspection of installations, equipment and materials.

A plumbing code set up by Public Water Supply District No. 1 under its statutory authority, would be void where its regulations conflicted with those of the existing county water code. The water supply district is necessarily subordinate to the county. Any regulations promulgated by the water district under Chapter 247 must be consistent with the provisions of the county charter. In the case of State vs. Gamble, 280 S.W. 2d 656, 1.c. 660, the Supreme Court said:

"[4,5] Moreover, charter counties are endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities. They are empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such areas. Section 18 (c), supra. These are police powers ordinarily vested in municipal corporations. See, for example, Sections 73.010 and 73.110 RSMo 1949, V.A.M.S., relating to the organization and powers of cities of the first class. A county under the special charter provisions of our constitution is possessed to a limited extent of a dual nature and functions in a dual capacity. It must perform state functions over the entire county and may perform functions of a

Honorable Eric F. Fink

local or municipal nature at least in the unincorporated parts of the county. These are constitutional grants which are not subject to, but take precedence over, the legislative power. * * * "

However, the water supply district is not precluded from making plumbing code regulations which are not in conflict with those laid down by the county. Vest vs. Kansas City, et al., 194 S.W. 2d 38. The public water supply district must follow the existing plumbing code where it is applicable, but may set up regulations which do not in any way contradict or conflict with the regulations of the county code. It is our opinion that the public water supply district could institute a plumbing code which was designed to supplement the existing county plumbing code as long as it did not conflict with any of the provisions of the existing code.

CONCLUSION

It is the opinion of this office that Public Water Supply District No. 1 in St. Louis County, including only unincorporated territories of the county, organized under Sections 247.010 to 247.220, RSMo 1959, can set up plumbing code regulations which are incident and necessary to the operation of the water district. However, such regulations cannot abrogate or contradict any of the provisions of the existing county plumbing code which has been adopted by the St. Louis County Council pursuant to the Constitutional Charter of St. Louis County and Sections 341.090 to 341.220, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

ANNEXATION:
THIRD CLASS CITIES:
COUNTY LIBRARY DISTRICT:
PART OF LIBRARY DISTRICT:
OF ANNEXING CITY: WHEN:

It is the opinion of this office that territory annexed to a third class city which maintains a free public library supported by taxation pursuant to annexation proceedings pending on October 13, 1965, ceases to be a part of a county

library district in which such territory was located prior to such annexation and becomes part of the municipal library district.

Opinion No. 421 (1967)
Opinion No. 92 (1968)

February 22, 1968



Honorable Bill Burlison
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri 63701

Dear Mr. Burlison:

This office is in receipt of your request for a legal opinion upon the matter presented in your letter and which reads as follows:

"Section 182.480 Missouri Revised Statutes, enacted in 1965, provides for creation of municipal library districts, and purports to govern areas annexed after October 13, 1965.

Though early in the statute there is some indication of intent to include "any annexation pending on October 13, 1965..." as within the municipal library district, this language is completely abandoned throughout the balance of the statute, and the terms "annexation" and "annexed areas" are those exclusively used and in apparent disregard of annexations "pending".

There were annexation proceedings pending in Cape Girardeau on October 13, 1965, and certain territory was finally annexed in 1967. The city contends the annexed area is within the municipal district. The county contends it remains within the county district. Please decide..."

Supplementing the opinion request is your letter of January 8, 1968, reading as follows:

Honorable Bill Burlison

"This letter is in response to your inquiry of December 26, 1967.

My previous statement that annexation boundaries were changed after October 13, 1965, was in error. The initial annexation suit was dismissed and a new one filed on September 20, 1965. There were no subsequent changes made in the boundaries.

As to your question about proceedings still pending, there are none. The decision of the Common Pleas Court was appealed to the St. Louis Court of Appeals, and there affirmed some months ago..."

Cape Girardeau is a City of the third class. Section 77.020 R.S. Mo. 1959, provides how the city limits of a third class city may be altered and reads as follows:

"The mayor and council of such city, with the consent of a majority of the legal voters of such city voting at an election thereof, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city."

Section 71.015, R.S. Mo. 1959, requires a city the governing body of which has adopted a resolution to annex unincorporated land, before proceeding further, to bring a suit in the circuit court of the county in which the unincorporated area sought to be annexed is located, for a declaratory judgment authorizing the annexation in accordance with that section, commonly referred to as the Sawyers Act.

Since the City of Cape Girardeau filed suit for a declaratory judgment authorizing the annexation of the territory forming a part of the county library district, there was an annexation pending insofar as such territory is concerned, on October 13, 1965.

Section 182.470, R.S. Mo. Cum. Supp. 1967, gives the purpose of 182.470 to 182.510 and reads as follows:

"The purpose of Sections 182.130 and 182.470 to 182.510 is to eliminate taxation of certain property which is now being taxed for the support and maintenance

of a county library district and a city library or a public library supported and maintained by a school district and as of October 13, 1965, to permanently fix the geographical boundaries of both city and county library districts, and to preserve the territorial integrity of both city and county library districts."

Section 182.480 R.S. Mo. Cum. Supp. 1967, is in regard to city library districts and what property is subject to taxation therein. Said section reads as follows:

As of October 13, 1965, and any other provisions of law to the contrary notwithstanding, all of the area or territory included within the geographical boundaries of a city, including any area or territory which becomes a part of any city pursuant to any annexation pending on October 13, 1965, which maintains a free public library supported at least in part by taxation, shall be a "municipal library district" and shall have as its purpose the furnishing of free public library services to residents of the district, and the district shall be known as "The City of _____ Municipal Library District," and each such district shall be a political subdivision of the State of Missouri and a body corporate with all the powers and rights of like or similar corporations, and as of the effective date of Sections 182.130 and 182.470 to 182.510 all of the area or territory which is hereby included within a municipal library district shall be excluded from the boundaries of any existing county library district, and all of the taxable property located in the municipal library district shall only be subject to taxation by the municipal library district and shall hereafter not be subject to taxation by the county library district; provided, however, that after October 13, 1965, any annexation by a city having within its boundaries a municipal library district shall not extend the boundaries of the municipal library district, and any annexed areas shall remain in the county library district, and the taxable property in any such annexed areas shall only be subject to taxation by the county library district and shall not be subject to taxation by the municipal library district; except, that in any county not

Honorable Bill Burlison

having a county library any such annexation shall likewise extend the boundaries of any existing municipal library district.

From the facts given in the opinion request and supplemental letter of January 8, 1968, it appears that the annexation suit, i.e., the one in which the judgment was affirmed by the St. Louis Court of Appeals, was started on September 20, 1965, although the territory of the unincorporated area was not actually taken into the City of Cape Girardeau, until 1967. The territory annexed to said city was part of a county library district and the county authorities contend that part of the territory annexed contained within the county library district, is still a part of that district. The city authorities contend that the annexed territory is no longer a part of the county library district, but that the territory of said county library district annexed to the city is within the municipal library district.

From the factual situation involving the opinion request, it will be recalled the annexation proceedings were pending on October 13, 1965, the date fixed by Section 182.480, supra, when such section became effective.

It will be recalled that part of the territory of the county library district was included in and finally taken into the city by the annexation proceedings, which had the effect of excluding such territory from the county library district and including it within the boundaries of the city library district, under provisions of Section 182.480 supra. All taxable property within the municipal library district is subject to taxation in that district and is not taxable in the county library district except as provided in Section 182.500 R.S. Mo. Supp. 1967. Under the proviso of Section 182.480 supra only when annexation proceedings are instituted after October 13, 1965, does the county library district remain intact.

We repeat that the annexation proceedings under consideration were begun prior to and were pending on October 13, 1965, and the proviso of said section is inapplicable here. In view of the foregoing, our answer to the inquiry of the opinion request is that the annexed territory which was part of the county library district became a part of, and is now included within the territory of the municipal library district of the City of Cape Girardeau, and is no longer part of the county library district.

CONCLUSION

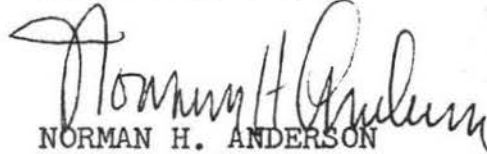
It is the opinion of this office that territory annexed to a third class city which maintains a free public library supported by taxation pursuant to annexation proceedings pending on October 13, 1965,

Honorable Bill Burlison

ceases to be a part of a county library district in which such territory was located prior to such annexation and becomes part of the municipal library district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

COUNTY AUDITOR:
COUNTY COURT:
COUNTY WARRANTS:

The approval of the county auditor is necessary before the county court of a second class county can order payment of a claim against the county out of the county treasury and issue a warrant for such payment, and the county court has the further power to determine whether such a claim shall be paid.

May 14, 1968

OPINION NO. 95
424 (1967)



Honorable Charles A. Sheehan
State Representative - District 132
Missouri House of Representatives
Route 1, Box 434
House Springs, Missouri 63051

Dear Representative Sheehan:

This is in response to your request for an opinion, dated October 27, 1967, which reads as follows:

"It is requested that an Attorney General's opinion be issued to the undersigned on the following question: Section 50.160 and Section 55.161 R.S. Mo. 1959 outlines similar duties for both the County Court and the County Auditor in the matter of auditing, adjusting and settling all accounts to which the County shall be a party.

Jefferson County is a second-class county, and my inquiry is, 'Does the County Court have this power in a second-class county equal or co-terminus with the power of the County Auditor?' To express the inquiry in another way, 'Can the County Court insist on auditing, adjusting and settling accounts by itself, or is this power reserved exclusively by the County Auditor?'"

The pertinent part of Section 55.160, RSMo 1959, is as follows:

". . . He shall keep accounts of all appropriations and expenditures made by the county court, and no warrant shall be drawn or obligation incurred without his certification that an unencumbered balance, sufficient to pay the

Honorable Charles A. Sheehan

same, remain in the appropriation account or in the anticipated revenue fund against which such warrant or obligation is to be charged. He shall audit the accounts of all officers of the county annually or upon their retirement from office. The auditor shall audit, examine and adjust all accounts, demands, and claims of every kind and character presented for payment against said county, and shall in his discretion approve to the county court of said county all lawful, true, just and legal accounts, demands and claims of every kind and character payable out of the county revenue or out of any county funds before the same shall be allowed and a warrant issued therefor by said court;"

This section clearly provides that the claims against the county shall not be allowed unless and until the county auditor approves to the county court such claims.

The pertinent portions of Section 50.160, RSMo 1959, is as follows:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts;

* * * * *

and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts,"

Section 50.180, RSMo 1959, is as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:"

Honorable Charles A. Sheehan

We believe that Sections 50.160, RSMo 1959 and 50.180, RSMo 1959, as above quoted, are relevant in providing that the county court shall adjust and settle all accounts to which the county is a party and order the payment out of the treasury of money found due by the county and when so found, the county court issues its warrant for payment.

It is the view of this office that each of the foregoing Sections quoted, Section 50.160, RSMo 1959, and Section 50.180, RSMo 1959, are in full force and effect and that such Sections are not repugnant to each other and must therefore, be held to provide that the county court cannot pay a claim until it has been approved by the county auditor but that the county court does have the power to determine after approval by the county auditor whether such claim is a valid claim and only if the county court so determines a warrant shall be issued.

The Supreme Court in Jackson County vs. Fayman, 44 S.W.2d 879, discusses at length the duties and powers of the county courts with regard to auditing and paying claims presented to them, and it says at l.c. 852,

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well settled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

The Court further says at l.c. 853,

"This case has not been overruled, but approved many times, and the same doctrine was restated in State ex rel. v. Diemer, 255 Mo. 336, 351, 164 S.W. 517, 521, in this

Honorable Charles A. Sheehan

language: 'In the allowance of claims against a county, or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, and their allowance of disallowance of a claim is res adjudicata. . . .'

The case discussed and referred to with approval by the Supreme Court in Perkins v. Burks, 78 S.W.2d 845, refers and says,

" . . . For a discussion of the powers and duties of the county court in auditing and settling demands against the county, see Jackson County v. Fayman, 329 Mo. 423, 44 S.W.(2d) 849. . . ."

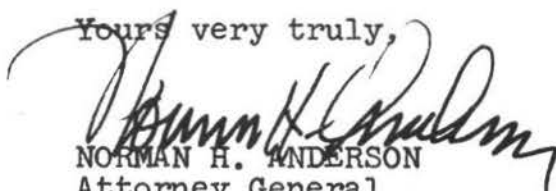
Under these rulings, even though such action in approving claims by the county court is not judicial, the action is, under the administrative power of county courts in administering fiscal affairs of the county, quasi judicial and is not ministerial.

CONCLUSION

It is the opinion of this office that the approval of the county auditor is necessary before the county court of a second class county can order payment of a claim against the county out of the county treasury and issue a warrant for such payment, and the county court has the further power to determine whether such a claim shall be paid.

The foregoing opinion, which hereby approve, was prepared by my Assistant, Arnold Brannock.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

SHERIFFS: The requirements of Section 57.220, RSMo, requiring that
DEPUTIES: the number of deputy sheriffs in a second class county be
not less than one chief deputy sheriff and one additional
deputy for each five thousand inhabitants of the county,
are met by the appointment of a chief deputy, five "full-time"
deputies and four "half-time" deputies in a second class county with
a population of 42,020.

OPINION NO. 97
NO. 427 (1967)

February 6, 1968



Honorable Bill D. Burlison
Prosecuting Attorney
Cape Girardeau County
238 Broadway
Cape Girardeau, Missouri 63701

Dear Mr. Burlison:

Reference is made to your request for an official opinion of
this office, which request reads as follows:

"At the request of the Cape Girardeau
County Sheriff, I seek some clarification
of Section 57.220 Missouri Revised
Statutes.

As I interpret the statute, Cape Girardeau
County is required to have a minimum of
eight deputies and a chief deputy inasmuch
as the population by the last census stands
at just over 42,000.

At the present time, the county has one
chief deputy, five full-time deputies and
four part-time deputies. Two of the full-
time deputies are female secretaries who
have been deputized. The four part-time
deputies work half-time and receive one-
half of the pay they would receive as full-
time deputies.

Does the statute require that the county
have eight full-time deputies?

Is it permissible or required to count two
part-time (half-time) deputies as one deputy?

Is it permissible or required that the female
clerical help that has been deputized be
counted toward the eight required deputies?

Honorable Bill D. Burlison

Is it permissible to deputize female clerical help merely for the purpose of complying with the deputy minimum requirement? Or should such clerical help be pursuant to Section 57.240?"

In your letter of November 3, 1967, you state:

" * * * The two employees in question were not employed for the purpose of performing duties of the Sheriff as set out in Chapter 57. However, in unusual situations, they have performed such duties as serving defendants with legal papers when such defendants happened by the Sheriff's Office and they have, on rare occasions, accompanied the Sheriff or his deputies in the apprehension of female defendants and for transportation of female subjects to state institutions."

With regard to the first question, "does the statute require that the county have eight full-time deputies?", we find that Cape Girardeau County has a population of 42,020 according to the last decennial census and is a second class county. The appointment of deputies in class two counties is definitely set forth as to numbers in Section 57.220, RSMo 1959, which among other things, provides:

" * * * such number of deputies appointed by the sheriff shall not be less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the county according to the last decennial census * * *."

The circuit court determines the necessary number of deputies. The employment of one chief deputy, five full-time deputies and four part-time deputies, of which two of the full-time deputies are female secretaries and also perform some of the duties of a deputy sheriff, who have been deputized meets the requirements of Section 57.220, RSMo 1959. This statute is clear in its provision and states that the number of deputies "shall" not be less than as above quoted.

There is no law that requires that a deputy in a second class county shall perform all of the duties of the sheriff; nor is there any provision for the length of time, as to the amount of hours or portions of the day, that a deputy shall be employed by the sheriff.

Honorable Bill D. Burlison

It is believed that the rule to be followed here is set out in the case of State ex rel. Gray vs. Wilder, 206 Mo. 541, 105 S.W. 272, 1.c. 274, where the court said:

" * * * It is fundamental and one of the cardinal rules in the construction of statutes that the true intent and meaning of the lawmaking authority, as expressed in the language employed, should, if possible, be ascertained and declared. On the other hand, it is equally well settled that words and phrases shall be taken in their plain or ordinary and usual sense, and that it is incumbent upon the courts to construe a statute as written, without regard to the results of the construction, or the wisdom of the law as thus construed. * * * "

Your second question, "is it permissible or required to count two part-time (half-time) deputies as one deputy?", has been answered above since there is no distinction so far as Section 57.220 is concerned between "full-time" and "half-time" deputies.

In your third question you ask whether female clerks who have been deputized may or should be classed as deputies. Clerks have been appointed deputies by the sheriff and such appointments, approved by the circuit court, must be counted in determining the number of deputies in the county. You state that the deputized clerical help are performing some of the duties imposed on the sheriff under Chapter 57, RSMo 1959. Since this is true, your third question is answered by our ruling on your first question.

Your fourth question asks whether the female clerks who have been appointed deputies should be counted in determining the number of deputies in the county. You have stated that such deputies are performing duties imposed by law on the sheriff and his deputies. Therefore, your fourth question is answered by the discussion of question number one since such persons are deputy sheriffs.

CONCLUSION


It is the opinion of this office that the requirements of Section 57.220, RSMo, requiring that the number of deputy sheriffs in a second class county be not less than one chief deputy sheriff and one additional deputy for each five thousand inhabitants of the

Honorable Bill D. Burlison

county, are met by the appointment of a chief deputy, five "full-time" deputies and four "half-time" deputies in a second class county with a population of 42,020.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Arnold Brannock.

Very truly yours,

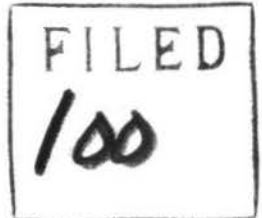


NORMAN H. ANDERSON
Attorney General

OPINION NO. 100
No. 430 (1967)
Answered by Letter (Brannock)

January 29, 1968

Honorable J. Anthony Dill
State Representative
District 44
8011 Grandvista Avenue
Affton, Missouri 63125



Dear Representative Dill:

This office is in receipt of your letter dated November 1, 1967, in which you request an opinion as follows:

"A group of citizens in St. Louis County have contacted me regarding the possibility of placing a proposed constitutional amendment on the ballot in the 1968 November election.

Enclosed please find a draft of the proposition which they plan to circulate. Regarding this proposal, your opinion is respectfully requested on these questions:

1. Is the proposed new section 6 of Article X of the Constitution effective to cause repeal of personal property taxation on household goods if adopted?
2. Is the proposed petition legally sufficient in form to place the question on the ballot if the necessary signatures are secured?
3. Regarding the jurat required by R.S.Mo. 126.040, is it necessary to spell out the name of each signer of the petition in the verification?
4. R.S.Mo. 126.030 specifies that eight percent (8%) of 'legal voters' must sign in 2/3 of the 'congressional districts'. What is the

Honorable J. Anthony Dill

exact meaning of the term 'legal voters' -all registered voters, all who voted for governor in the last general election, or what? Also, what 'congressional districts' should be used- the ones created in 1961, 1965, 1967 or what?"

In answer to the first question, which is whether the proposed new Section 6 of Article X of the Constitution, if enacted by a vote of the people so as to become a part of the Constitution would be effective so as to exempt household goods from property taxation, it is the view of this office that it would be effective so as to exempt personal property taxation on household goods. The proposed amendment provides that "household goods, furniture, wearing apparel and articles of personal use and adornment owned and used by a person in his home or dwelling place, are exempt from taxation". The language of the proposed amendment is clear in providing that household goods are exempt from taxation.

Your second question inquires whether the proposed petition is legally sufficient to place the question on the ballot if the necessary signatures are secured. The initiative petition form which you have submitted follows the form set out in Section 126.030, and is, we believe, in substantial compliance with the requirements of such section. However, we call your attention to two changes that we believe might well be made in the initiative petition form. You will note that Section 126.030 provides that every sheet shall be attached to a "full and correct copy of the title and text of the measure so proposed". It is suggested that a title be set out in addition to the full text of the amendment. Such a title would, of course, be repetitious of the provisions of the amendment itself but Section 126.030 contemplates a title. A title might read "an amendment repealing section 6 of Article X of the Constitution of Missouri and enacting a new section in lieu thereof relating to the same subject". Section 50 of Article III of the Constitution also provides that the enacting clause of an initiative petition for a constitutional amendment shall be "be it resolved by the people of the State of Missouri that the Constitution be amended". It is suggested that this enacting clause immediately precede Section 1 in the petition form. With these additions it is our view that the suggested form of initiative petition would be sufficient to place the question on the ballot if the necessary signatures are secured.

Question No. 3 asks whether in the jurat required by Section 126.040, RSMo, it is necessary to list the name of each signer of the petition. Section 126.040 provides in part as follows:

Honorable J. Anthony Dill

"Each and every sheet of every such petition containing signatures shall be verified in substantially the following form by the person who circulated said sheet of said petition, by his or her affidavit thereon and as part thereof:

State of Missouri,)
County of _____) SS.

I, _____, being first duly sworn, say (here shall be legibly written or typewritten the name of the signers of the sheet), signed this sheet of the foregoing petition, and each of them signed his name thereto in my presence; I believe that each has stated his name, post office address and residence correctly, and that each signer is a legal voter of the state of Missouri and county of _____. * * * "

It appears to this office from the provisions of Section 126.040, RSMo 1959, setting forth the form to be followed substantially that such is required. While the statutory form does not have to be followed exactly, it does require a listing by legible writing or typewriting of the names of the signers of the sheet and this is required in order to be in substantial compliance.

Question No. 4 asks the meaning of the term "legal voters" as used in Section 126.030 and asks what congressional districts should be used in determining the required number of signatures. The question is answered by the attached opinion rendered April 13, 1962, to the Honorable Warren E. Hearnes pointing out that under Section 53 of Article III of the Constitution, the number of legal voters required is based upon the total vote for governor at the preceding general election last preceding the filing of the petition. Such opinion also holds that the congressional districts to be considered in determining the validity of an initiative petition are the districts presently entitled to representatives in Congress, that is, the districts from which representatives in Congress were elected in 1966.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Enc.--Op.; 4/13/62; Hearnes
AB/jlf

COMMISSIONER OF FINANCE: The Commissioner of Finance may process BANK APPLICATIONS: first either the bank application first received or the application first completed. He may exercise his discretion as to which will be processed first without prejudice to either party.

OPINION NO. 432 (1967)
101 (1968)

January 11, 1968

Honorable C. W. Culley
Commissioner of Finance
Jefferson Building
Jefferson City, Missouri



Dear Commissioner Culley:

This is in response to your letter of November 1, 1967, requesting an opinion on the following question:

Shall the Commissioner of Finance of the State of Missouri, acting under his statutory authority, process two applications for bank charters from the same geographical area so that the application first filed, but which was not fully completed when filed has precedence; or, shall he process them so that the application filed second, but which was fully completed when filed, has precedence?

The general banking law of Missouri which was in force prior to October 13, 1967, is found in Chapter 362, RSMo 1959. Sections 362.015 to 362.040 set forth the procedure which must be followed by those who wish to obtain a bank charter. In general terms, those sections require that an application be filed with the Commissioner of Finance who must make a full investigation of the matter and thereafter approve the application before a charter will be granted. The investigatory duties of the Commissioner are spelled out in Section 362.030, RSMo 1959. After receiving a copy of the proposed bank's articles of agreement, the Commissioner of Finance shall:

" * * * cause an examination to be made to ascertain whether the requisite capital of such bank has been subscribed in good faith and paid in actual cash and is ready for use in the transaction of business of the proposed bank, and whether the character, responsibility and general fitness of the

Honorable C. W. Culley

persons named in the articles of agreement are such as to command confidence and warrant belief that the business of the proposed corporation will be conducted honestly and efficiently in accordance with the intent and purpose of this chapter; and if the convenience and needs of the community to be served justify and warrant the opening of such bank therein, and if the probable volume of business in such locality is sufficient to insure and maintain the solvency of the then existing banks and trust companies in the locality, without endangering the safety of any bank in the locality as a place of deposit of public and private moneys."

After making his examination, the Commissioner may approve the application and grant a charter (Section 362.035) or he may not approve the application or grant a charter (Section 362.040), depending upon whether or not he is satisfied with the results of his examination. Those who have an application turned down by the Commissioner may appeal his decision to the State Banking Board. Section 362.094, RSMo 1959. However, it is clear that the Commissioner is granted great discretionary power to approve or disapprove bank charter applications subject to the review of the State Banking Board.

Chapter 362 does not require the Commissioner to process bank charter applications in any particular way. Section 362.030 sets up the various standards and guidelines which he must follow in carrying out his investigation as to the fitness of a particular charter applicant and these standards serve as a basis for the reasonable exercise of his discretion in approving or disapproving. Certainly, in view of this section, it is reasonable for the Commissioner to require those applying for a charter to do more than file a bare application. Normally, he requires the applicant, either before or after filing, to furnish him with information and data which supports the application and aids the Commissioner in his examination. It is axiomatic that an application cannot be processed and approved until it has been fully completed. Something more than a mere filing of the application is necessary to get final approval.

The statutes do not spell out any particular order that the Commissioner must follow in processing the applications that he receives. Neither do we know of any cases which have ruled on this point. A general rule of statutory construction holds that a statute must be given a reasonable interpretation. Since the statute in

Honorable C. W. Culley

question is silent on the point at bar, we shall look at it in a reasonable perspective. If two similar applications are received by the Commissioner of Finance, it is reasonable for him to consider first the application which was first received. However, in light of the Commissioner's duty under Section 362.030, it is just as reasonable for him to process an application first which is complete and ready for his consideration even though it was filed subsequent in time to an incomplete application.

A statutory duty is ministerial when the statute prescribes and defines exactly what, when and how something is to be handled. If a statute contemplates that the particular method by which something is to be done shall be left to the judgment of the one charged with carrying out the duty, it is discretionary in nature. Where the statute is completely silent as to which application shall be processed first, it is not ministerial and can only be discretionary.

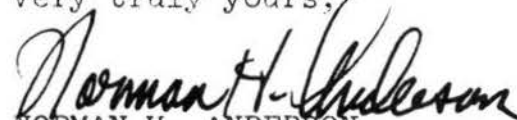
The Commissioner of Finance has discretionary power given to him in several areas of his job. In Section 361.240, he is expressly given broad discretionary power: "In any case in which this chapter makes the approval of the Commissioner a condition precedent to the doing of any act, unless otherwise provided by law, it shall lie within his sound discretion to grant or refuse his approval." (Emphasis added.) Although this section refers to Chapter 361, it is applicable to Chapter 362 as well, because Section 361.020 charges the Division of Finance with the responsibility of executing the laws relating to banks (Chapter 362). An important part of the banking law, of course, is the approval or rejection of bank charter applications under Sections 362.015 to 362.040. Section 361.240 seems to give express discretionary power to the Commissioner of Finance in addition to the implied discretionary authority inherent in Sections 362.015 to 362.040. The order in which two applications shall be processed is, therefore, a matter which is within the ambit of the Commissioner's discretionary authority.

CONCLUSION

It is our opinion that the Commissioner of Finance may process first either the application first received or the application first completed. Either approach is reasonable under the applicable statutes and the Commissioner may exercise his discretion as to which will be processed first without prejudice to either party.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

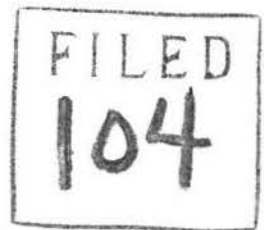
COMPATIBILITY OF OFFICES:
CORONERS:
DEPUTY SHERIFFS:
SHERIFFS:

The same individual cannot serve in the dual capacity of coroner and deputy sheriff because the two offices are incompatible.

OPINION NO. 104
436 (1967)

March 19, 1968

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in answer to your request for an opinion of this office on two questions concerning sheriffs and coroners. The first question reads as follows:

"When the office of sheriff of a third class county became vacant due to the resignation of the sheriff and the coroner of the county acted as sheriff from the date of resignation and until the successor sheriff was elected at a special election and assumed office, the following question is posed:

"q. - Would the coroner of the county be entitled to receive any compensation, other than that provided by statute for coroner's salary, for acting sheriff during the period of vacancy?"

This exact question was dealt with in an Attorney General's Opinion, dated October 6, 1955, to the Honorable John Hosmer (copy enclosed). That opinion held that a coroner performing the duties of sheriff due to a vacancy in the office may not receive additional salary. We still adhere to this opinion which answers your question.

Honorable Haskell Holman

Your second question reads as follows:

"When a duly elected and qualified coroner of a third class county is appointed as deputy sheriff by the sheriff, the following questions arise:

"1. Is it permissible for the same individual to serve in the dual capacity of coroner and deputy sheriff?

"2. If the answer to question No. 1 is in the affirmative, would the coroner appointed as deputy sheriff be entitled to receive compensation and expense reimbursement from the county for services performed as deputy sheriff in addition to the statutory salary allowed to him as coroner?"

The answer to the first question depends on whether the office of deputy sheriff and coroner are incompatible.

Compatibility and incompatibility of offices is a common law doctrine which was discussed in the leading Missouri case of State ex rel. Walker v. Bus, 135 Mo. 325, where the Court said, l.c. 338, 339:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

Honorable Haskell Holman

"It was said by Judge Folger in People ex rel. v. Green, 58 N. Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

Where incompatibility of offices exists, the courts of this state have held that the officeholders may not hold such offices. This is a common law limitation prohibiting the holding of two offices which are incompatible.

It is our opinion that because of Section 58.190, RSMo 1959, that the two offices are incompatible. This Section reads as follows:

"Every coroner, within the county for which he is elected or appointed, shall serve and execute all writs and precepts, and perform all other duties of the sheriff, when the sheriff shall be a party, or when it shall appear to the court out of which the process shall issue, or to the clerk thereof, in vacation, that the sheriff is interested in the suit, related to or prejudiced against any party thereto, or in anywise disqualified from acting; in such case, the county court may require the coroner to give an additional bond."

Honorable Haskell Holman

Deputy sheriffs of third and fourth class counties are appointed by the sheriff. Section 57.250, RSMo 1959. The coroner in performance of his duties as sheriff under Section 58.190, supra, would be in a position of supervision over himself as deputy sheriff.

CONCLUSION

It is the opinion of this office that the same individual cannot serve in the dual capacity of coroner and deputy sheriff because the two offices are incompatible.

The foregoing opinion which I hereby approve was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

Enclosure
(Opn. dated 10/6/55/Hosmer)

COURT REPORTER:
JUVENILE COURT:
AUDITS:
COSTS:
FEES:

The clerk of the juvenile court should tax as cost the five dollar fee provided for by Section 485.120, RSMo 1959, when the juvenile court appoints an official court reporter. The five dollar fee must be paid by the clerk into the county or city treasury and the court reporter is not entitled to same.

OPINION NO. 105

October 9, 1968



The Honorable Haskell Holman
State Auditor
State of Missouri
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This is in answer to your request for an opinion of this office, which request reads as follows:

"Several questions have arisen during the process of a county audit pertaining to the fee of the court reporter and I respectfully request and will appreciate your official opinion relative to the following questions:

"1. Should the clerk of the juvenile court tax as cost in each juvenile proceeding and collect from the county the court reporter fee of \$5.00 and when collected pay over the fee to the court reporter?

"2. In the event the answer to question No. 1 is in the affirmative, would the court reporter be entitled to retain said fee or is it an accountable fee and must be reported and paid over to the county treasurer by the court reporter?

"Your earliest possible attention to this matter will be greatly appreciated."

The Honorable Haskell Holman

A juvenile court is defined in Section 211.021, RSMo 1959, as:

"(3) 'Juvenile court' means the Cape Girardeau court of common pleas and the circuit court of each county, except that in the judicial circuits having more than one judge, the term means the juvenile division of the circuit court of the county;"

The clerk of the circuit court or a deputy acts as the clerk of the juvenile court. Section 211.211, RSMo 1959, and Section 483.300, RSMo 1959.

The procedure for juvenile court hearings is provided for in Section 211.171, RSMo 1959, which reads in part as follows:

"4. Stenographic notes or an authorized recording of the hearing shall be required if the court so orders or if requested by any party interested in the proceeding."

Fees are provided court reporters by Section 485.120, RSMo 1959, which reads as follows:

"In every contested case, or case in which the evidence is to be preserved, except for the collection of delinquent or back taxes, in any circuit court or division thereof, when an official court reporter is appointed, the clerk of said court shall tax up the sum of five dollars, to be collected as other costs, and paid by said clerk into the county or city treasury, towards reimbursing the county or city for the compensation allowed such reporter as hereinbefore provided."

It is our opinion that an official court reporter may be appointed in a juvenile court proceeding under the authority of Sections 211.171 and 485.120, *supra*. When this occurs, the clerk of the juvenile court shall tax five dollars as cost. The five dollar fee should be collected as determined by the juvenile court under Section 211.281, RSMo 1959, which reads as follows:

"The costs of the proceedings in any case in the juvenile court may, in the discretion of the court be adjudged against the parents of the child involved or the informing witness as provided in section 211.081, as the case may be, and collected as provided by law. All costs not so collected shall be paid by the county."

The Honorable Haskell Holman

Enclosed is a copy of Attorney General's Opinion dated October 29, 1943, issued to the Honorable Max R. Wiley, discussing Section 211.281, supra.

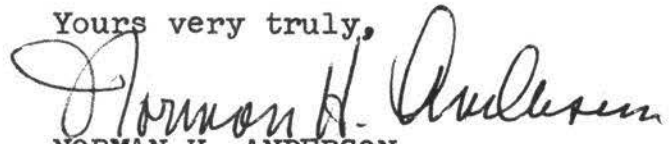
Section 485.120, supra, directs that such five dollar fee, when collected, shall be paid into the county or city treasury to reimburse the county or city for the court reporter's compensation. Court reporters receive yearly compensation paid by the state and counties. Section 485.060 and 485.065, RSMo Supp. 1967. Therefore, the five dollar fee is not paid to the court reporter and so the answer to your second question is in the negative.

CONCLUSION

It is the opinion of this office that the clerk of the juvenile court should tax as cost the five dollar fee provided for by Section 485.120, RSMo 1959, when the juvenile court appoints an official court reporter. The five dollar fee must be paid by the clerk into the county or city treasury and the court reporter is not entitled to same.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion dated 10/29/43 - Wiley

STATE UNIVERSITY:
POLICE OFFICERS:
SHERIFF:
ARREST:

City police officers, sheriff, and
state highway patrol have jurisdiction
over crimes committed on state uni-
versity property.

OPINION NO. 108

December 19, 1968



Honorable Zane White
Prosecuting Attorney
Phelps County
Court House
Rolla, Missouri 65401

Dear Mr. White:

This is in response to your request for an opinion on the
following questions, to-wit:

"1. Is the land and buildings of the Univer-
sity of Missouri, at Rolla, which is a federal
land grant college and a state university,
and is located entirely inside the city limits
of the City of Rolla, Phelps County, Missouri,
'off limits' with respect to their official
duties to any of the following:

- a. The city police of Rolla, Missouri
- b. Phelps County Sheriff and his deputies
- c. Missouri State Highway Patrol
- d. Federal Bureau of Investigation and
other federal officers.

"2. What is the status, responsibility, author-
ity and duties of the campus police respecting
investigation of state law violations?

a. If the campus police make an investiga-
tion of a state law violation, what is their
relationship to the county sheriff, the county
prosecutor and other officials?"

Honorable Zane White

Under Article IV, Section 9(a) of the Constitution of Missouri, the government of the state university is vested in a Board of Curators; and Section 9(b) requires the General Assembly to maintain it. These constitutional provisions have been implemented by Chapter 172, RSMo 1959. Section 172.260 provides that it shall be the duty of the Board of Curators to provide for the protection and enforcement of the site of the university and to erect and maintain thereon all edifices. Section 172.350 provides for the curators to appoint watchmen, "* * * to protect property and to preserve peace and good order in the public buildings * * *", with power to maintain order, preserve peace, and make arrests as peace officers on the campus, grounds, and farms over which they have control. Under these statutes their jurisdiction would apply to property beyond the city limits belonging to the university as well as the property within the city. When any offense is committed in violation of the laws of this state, it is their duty to make whatever investigation and arrest that is necessary and report the same to the proper officials.

City police have the same authority to arrest as a sheriff has for violations of any of the laws. *State v. Nolan*, 354 Mo. 980, 192 S.W.2d 1016; *State v. Brown*, Mo. 291 S.W.2d 615. City police are given this authority by common law. *State v. Evans*, 161 Mo. 95, 61 S.W. 590. A sheriff has no authority to arrest beyond the limits of his county unless in hot pursuit. *Ex parte Knight*, 308 Mo. 538; *State v. Owen*, Mo. 258 S.W.2d 662.

City police of a third class city have no authority to arrest any person for violations beyond the city limits of either state laws or city ordinances. *Rodgers v. Schroeder*, 220 Mo.App., 575, 287 S.W. 861. If the campus of the state university is not considered within the corporate limits of the city because it is state property, there is no doubt that the city police would not have authority to arrest for violations of the law on the campus. The same would be true regarding the jurisdiction of a sheriff because the property would not be considered as being within the county. However, we consider the campus of the University of Missouri at Rolla to be within the boundaries of the city and should be so considered in this opinion.

In *State ex rel St. Louis Union Trust Company v. Ferriss*, 304 S.W.2d 896, a zoning ordinance of the City of Ladue was held not applicable to a public school building being built in the City of Ladue. In *Kansas City v. School District of Kansas City*, 356 Mo. 364, 201 S.W.2d 930, the court upheld the right of the City of Kansas City to collect fees from the school district for inspection of the boiler, smoke stack, and other facilities in the school building.

In the case of the *Board of Education of City of St. Louis v. City of St. Louis*, 267 Mo. 356, 184 S.W. 975, an ordinance of the City of St. Louis as to the type of vents from water toilets was held not to apply to a school building being built in St. Louis.

Honorable Zane White

In *Smith v. Board of Education of City of St. Louis*, 359 Mo. 264, 221 S.W.2d 203, an ordinance providing for the inspection of food, cooking utensils, disposal of garbage, and clothing to be worn by the employees dealing with the food was held to be binding and valid and applicable to the school restaurant. In *Kansas City v. Fee*, 174 Mo.App., 501, 160 S.W. 537, the court held a city ordinance, which required firemen of steam boilers to be licensed by the city, applies to firemen in charge of the boiler in the public school.

It seems in these cases that the courts have made a distinction in ordinance regulations that apply to property and its use and ordinances dealing with the employees or individuals and their conduct on the premises. In other words it appears city ordinances that have anything to do with the control or use of the property of the public schools are held not to be binding on the school authorities. We do not consider these cases in point or of much weight in deciding the question that we have under consideration because they involved a local ordinance or building code, and the question we are considering is the application of a state law.

In *Hall v. City of Taft*, 41 Cal.2d 177, 302 P.2d 574, the Supreme Court of California held a city building regulation does not apply to a public school district's construction of a building in the city and in discussing the authority of the school district it said in part, l.c. 578:

"* * * When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation. * * *"

The cases *State ex rel St. Louis Union Trust Company v. Ferriss*, 304 S.W.2d 896; *Board of Education of City of St. Louis v. City of St. Louis*, 267 Mo. 356, 184 S.W. 975, and *Kansas City v. School District of Kansas City*, 356 Mo. 364, 201 S.W.2d 930, are cited in the above cited opinion.

It appears in the above case the court was making a distinction as to the authority of a city to make ordinances regarding the construction and maintenance of buildings and ordinances for the conduct of people at large such as breach of the peace, peace disturbance, etc.

It is our view that the city police of Rolla have the same authority to arrest a person on the campus of the University School of mines at Rolla for the violation of any state law as they have to arrest within the city limits.

Honorable Zane White

This is on the theory that the campus territory is not any different from any other property within the city limits and that the criminal laws of this state apply in the same manner as they do in any other part of the state. It is true the Board of Curators have exclusive jurisdiction of the construction of buildings, maintenance of the property, and governing of the university and the authority to appoint watchmen to protect the property and to arrest any person violating a state law on the premises; but this does not exclude the other peace officers from the premises for the performance of their duty. It is likewise true that the Board of Curators have authority to make necessary rules, enact ordinances, etc., regarding the government of the university; but it does not have authority to provide a penalty such as a fine or imprisonment enforceable in any court of this state for their violation. In other words they are not a municipal corporation with police power authority to enact ordinances that can be enforced and punished as a quasi criminal law in any court. We believe the criminal laws of this state apply on the campus of the university at Rolla in the same manner as they apply to any other property within the state and are to be enforced in the same manner and by the same officials that enforce any other state law.

Although the opinion request, as we consider it, involves only the enforcement of state and federal laws, it is our view that any ordinance of the City of Rolla which has been enacted or which may be enacted for the maintenance of public peace would be valid and enforceable by the city police on the campus, whereas ordinances relating to the construction of the buildings or use of the premises would not be applicable.

We do not believe the authority of the Federal Bureau of Investigation is a matter necessary to be considered in this because no duties of the prosecuting attorney are involved in such a matter.

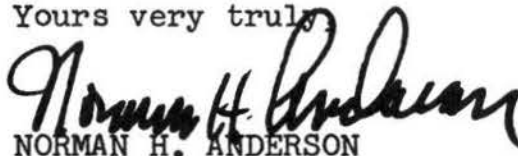
CONCLUSION

It is the opinion of this department that the police of the City of Rolla, Missouri, the sheriff of Phelps County, and the state highway patrol, have authority to investigate and arrest for violation of any criminal law on the campus of the University of Missouri at Rolla in the same manner and to the same extent as they have in any criminal matter within their respective jurisdictions. That it is the duty of the watchmen, appointed by the curators of the University of Missouri with authority to make arrests as peace officers, to arrest and report any violations of the state law of which they have knowledge to the proper authorities in the same manner as is required of any peace officer.

Honorable Zane White

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

March 11, 1968



Honorable Jerry Graves
Prosecuting Attorney
Newton County
Neosho, Missouri 64850

Dear Mr. Graves:

This is in answer to your letter of recent date in which you ask whether the county assessor of a third class county is required to furnish the county collector with the addresses of the owners of real estate listed on the real estate tax books, as well as, the addresses of the persons listed in the personal tax books.

You have advised us that there has been no election held under the provisions of Section 137.230, RSMo Supp., 1967, which would make Section 137.225 applicable to Newton County.

In view of the fact that Section 137.225 is not applicable to Newton County there is no requirement that the county assessor of Newton County furnish the collector with the addresses of owners of real estate listed in the real estate tax book of such county.

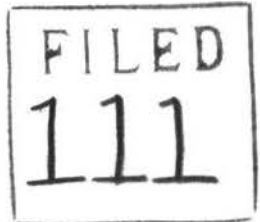
Very truly yours,

NORMAN H. ANDERSON
Attorney General

INSURANCE: There is nothing to prohibit a fire insurance company from switching from maintenance of its own public rating record to one that is maintained by an actuarial bureau if approval of the superintendent of insurance is obtained as prescribed by statute when the effect of said switching is to increase the fire insurance premium rates.

OPINION NO. 111
(445 - 1967)

July 1, 1968



Honorable Thomas D. Graham
State Representative
District 122
Hammond Building - 312 E. Capitol Avenue
Jefferson City, Missouri 65101

Dear Representative Graham:

This is in reply to your opinion request asking first, whether a fire insurance company presently maintaining its own public rating record as provided by Section 379.315, RSMo 1959, may withdraw said public rating record and use a public rating record maintained by the Missouri Inspection Bureau as set out in Section 379.320, RSMo 1959; and second, whether the provisions of Section 379.320, RSMo 1959, are contingent upon any favorable or unfavorable underwriting experience statistics.

In regard to your first question, Sections 379.315, 379.320, 379.335 and 379.405, RSMo 1959, are thought to be pertinent. Section 379.315, RSMo 1959, requires a fire insurance company to maintain a public rating record. Section 379.320, RSMo 1959, enables a company to maintain its own public rating record or to use a public rating record maintained by an actuarial bureau. Section 379.335, RSMo 1959, reads in part as follows:

"All public records required to be maintained by sections 379.315 to 379.415, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining

Honorable Thomas D. Graham

its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit; provided, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained but in making a change, it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance."

Section 379.405, RSMo 1959, reads as follows:

"Special and specific notice and schedule of any increase in rates made by any bureau, insurance company or other insurer (after February 23, 1915, and before this section takes effect) shall be filed with the superintendent of the division of insurance immediately upon the taking effect of sections 379.315 to 379.415, and unless approved by him such increase shall hereafter be deemed unreasonable and unjustifiable and it shall be unlawful for any insurance company or other insurer to charge or collect such increased rate until after the same has been duly approved by the superintendent of insurance."

Considering the aforementioned statutes in pari materia as required by the court in *Mitchum v. Perry*, 390 S.W.2d 600, there is nothing set out in Sections 379.315 or 379.320 to prohibit a company from switching from the maintenance of its own public rating record to one that is maintained by an actuarial bureau. However, if such change involves an increase in rates, then the provisions of Sections 379.335 and 379.405, RSMo 1959, are applicable. These sections authorize the superintendent of insurance to approve or disapprove any increase in fire insurance rates regardless of how such increase in rates is effected. In other words, where the effect of changing from one method of maintaining a public rating record to another results in increasing the insurer's rates, approval of the superintendent must be obtained. Failure to obtain such approval, where the effect of changing methods of maintaining the public rating record is to raise

Honorable Thomas D. Graham

the insurer's rates, is clearly contrary to the intent of the legislature in requiring specific approval of increased fire insurance premium rates.

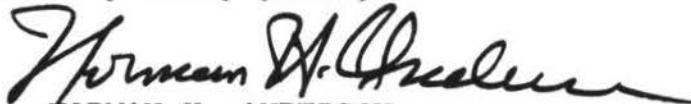
In reply to your second question, the discussion as set out above is thought to essentially answer said question.

CONCLUSION

This office is of the opinion that there is nothing to prohibit a fire insurance company from switching from maintenance of its own public rating record to one that is maintained by an actuarial bureau if approval of the superintendent of insurance is obtained as prescribed by statute when the effect of said switching is to increase the fire insurance premium rates.

The foregoing opinion, which I hereby approve, was prepared by my assistant, L. Michael Lorch.

Very truly yours,

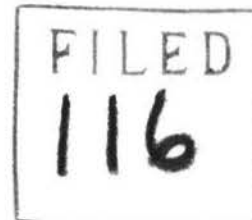

NORMAN H. ANDERSON
Attorney General

CREDIT UNIONS: The "one per cent a month on unpaid balances" interest
USURY: rate limitation as expressed in Section 370.300, RSMo
1959, is an exception to the general usury statute.
The interest rate limitations of Section 408.030, RSMo
1959, and Section 408.100, RSMo 1959, do not apply to credit union
loans and credit unions may legally charge up to " * * * one per cent
a month on unpaid balances; provided, however, that a minimum interest
charge not exceeding twenty-five cents per month shall be allowable
in all cases."

OPINION NO. 116
NO. 450 (1967)

March 19, 1968

Mr. Ira W. Whitson
Supervisor of Credit Unions
Division of Finance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Whitson:

This is in response to your letter of November 22, 1967, asking for an opinion on a question which we have chosen to phrase in the following manner:

May a credit union, pursuant to Section 370.330, RSMo 1959, charge its members a maximum of one per cent a month on the unpaid balance on all loans that they make regardless of the size and type of the loan or the type and amount of security which is given; or, must they also meet the requirements of Sections 408.030 and 408.100, RSMo 1959, which govern commercial interest rates in general?

Section 370.300, RSMo 1959, states as follows:

"A credit union may lend to its members at reasonable rates of interest, which shall not exceed one per cent a month on unpaid balances; provided, however, that a minimum interest charge not exceeding twenty-five cents per month shall be allowable in all cases."

It is clear that a credit union cannot go above a maximum effective interest rate of twelve (12) per cent per year on any loan that it makes. However, Section 370.300 does not state whether interest rate limitations found in other parts of the statutes are to be applied to credit unions.

Mr. Ira W. Whitson

Missouri has a general usury statute which prohibits persons from agreeing on an interest rate in excess of eight per cent per annum. Section 408.030, RSMo 1959. A statute limiting the amount of interest which may be charged has been in effect in Missouri since territorial days. Act Nov. 5, 1808, 1 Terr. Laws, p. 221 §2. The purpose of such statutes is to prevent the exacting of interest rates which the law deems to be usurious.

Section 408.100, RSMo 1959, deals with " * * * all loans of five hundred dollars or less which are not made as permitted by other laws of this state except that it shall not apply to loans which are secured by a lien on real estate, non-processed farm products, livestock, farm machinery or crops or to loans to corporations. * * * " The Missouri Supreme Court has had occasion to consider a statutory predecessor of this law enacted in 1927. It was held in Vining vs. Probst, 186 S.W. 2d 611, that " * * * all loans not exceeding \$300 in value [are] exclusively within the purview of the Small Loan Law; and all loans involving amounts greater than \$300 are exclusively under the regulations provided in Chapter 15, R.S.Mo. 1939." The Vining case held that the Small Loan Law was an exception to the general usury law and that when it applied it was to the exclusion of the general law. The court's rationale was that the Act of 1927, which created the Small Loan Law, repealed the general usury law by implication where the two were in conflict because it was (1) later in time than the general usury law and (2) dealt with the same subject matter in a more minute and particular way.

Under the present Small Loan Law, certain loans not exceeding five hundred dollars may be made at rates of interest up to 2.218 per cent per month on the unpaid balance. Credit unions may not avail themselves of this provision since Section 370.300, RSMo 1959, limits them to interest of one per cent per month on the unpaid balance. The question for consideration is whether credit unions which make loans for amounts in excess of the Small Loan Law must stay within the provisions of the general usury law (eight per cent) or whether they may charge up to twelve per cent regardless of the size of the loan.

The 54th General Assembly, which enacted the Small Loan Law interpreted by the court in the Vining case, also enacted the law governing credit unions (Laws of 1927, p. 166). Section 14 of that law said that "A credit union may lend to its members at reasonable rates of interest, which shall not exceed one per cent a month on unpaid balances . . . " (Laws of 1927, p. 170, §14). This provision, enacted at the same time as the Small Loan Law, would seem to have the same legal effect. The provision deals with interest rates on all loans made by credit unions. It is, therefore, later

Mr. Ira W. Whitson

in time than the general usury law and deals with the same subject matter (lending money) in a specific and particular manner. It can be viewed as an exception to the general usury law by following the reasoning of the Vining case. Under that rationale, the general usury statute would not apply to loans made by credit unions.

The fact that the Legislature put the twelve per cent interest rate limitation in the credit union law must be construed to have some meaning, otherwise they will be deemed to have acted in vain. If the Legislature had intended for credit unions to be governed by the existing general interest law, it is unlikely that they would have put a twelve per cent limitation on credit union loans. It is reasonable to assume that the Legislature intended to make the twelve per cent limitation apply in lieu of the eight per cent limitation under the general interest law.

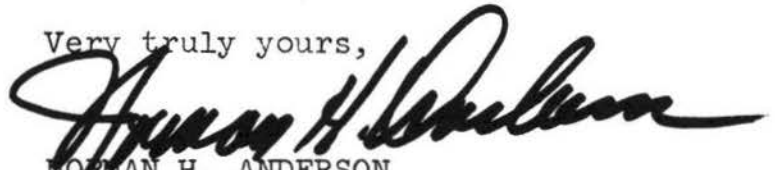
Historically, credit unions have been organized by groups of persons having some type of common bond with each other. Often, for example, it would be a bond established by place or nature of employment. A different relationship exists between loans made by credit unions to their members and loans negotiated between two completely unrelated parties. The Legislature recognized credit unions as a separate and independent type of lending institution by enacting the credit union law as a separate law. It is natural that the General Assembly meant for them to operate under a different interest rate limitation than that set up for other loans.

CONCLUSION

It is the opinion of this office that the "one per cent a month on unpaid balances" interest rate limitation as expressed in Section 370.300, RSMo 1959, is an exception to the general usury statute. We hold that the interest rate limitations of Section 408.030, RSMo 1959, and Section 408.100, RSMo 1959, do not apply to credit union loans and credit unions may legally charge up to " * * * one per cent a month on unpaid balances; provided, however, that a minimum interest charge not exceeding twenty-five cents per month shall be allowable in all cases."

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

MOTORCYCLE: Points assessed for failure to wear helmet.
HELMETS:
DRIVERS LICENSE:

OPINION NO. ¹¹⁹ 456 (1967)

January 9, 1968

Honorable Thomas A. David
Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr David:

This is in answer to your request for an opinion of this office, which so far as here pertinent reads as follows:

" * * * does the operation of a motor cycle without a helmet or protective headgear constitute a moving violation as contemplated under the provisions of paragraph 1(1), Section 302.302, Revised Statutes of Missouri? If so, would the assessment of two points upon conviction thereof be appropriate?"

House Bill 120, passed by the 74th General Assembly, repealed Section 302.020, RSMo 1959, and reenacted a new section in lieu thereof to be known as 302.020. Subsection 3, provides as follows:

"Every person operating or riding as a passenger on any motor cycle, as defined in section 301.010 RSMo, upon any highway of this state shall wear protective headgear at all times the vehicle is in motion. The protective headgear shall meet reasonable standards and specifications established by the director."

Violation of the provisions of this statute is a misdemeanor. Section 302.340, RSMo 1959.

The assessment of points for conviction of traffic violations is governed by Section 302.302, RSMo Supp. 1965, which provides in part as follows:

"1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operators' licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows:

Honorable Thomas A. David

(1) Any moving violation of a state law or county or municipal traffic ordinance not listed in this section, other than a violation of vehicle equipment provisions 2 points (except any violation of a municipal stop sign ordinance where no accident is involved, 1 point) * * * "

The term "Highway", as used in these statutes is described as "any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways, or alleys in any municipality;" 302.010 RSMo Supp. 1965.

"Moving violation" is defined in Section 302.010(10), RSMo Supp. 1965, as "that character of traffic violation where at the time of violation the motor vehicle involved is in motion, except that the term does not include the driving of a motor vehicle without a valid motor vehicle registration license, or violations of sections 304.170 to 304.240, RSMo, inclusive, relating to sizes and weights of vehicles;"

Since operating a motorcycle without a proper headgear by definition would be a "moving violation", the question is, "whether such a conviction would constitute a violation of the equipment provisions of the statute."

The provisions of these statutes are not ambiguous. Under Section 302.020, supra, the operator of a motorcycle upon the highways of the state shall wear a protective headgear at all times the vehicle is in motion and failure to comply with this provision constitutes a misdemeanor. The headgear must comply with the standards and specifications provided by the Director of Revenue. A person convicted of violating this provision of the statute comes within the provisions of Section 302.302, supra, in that it is a "moving violation" of the state law and under this section points shall be assessed against the operator's license as provided in this section.

In enacting Section 302.302, supra, the legislature expressly exempted persons convicted of violating the motor vehicle equipment provisions of the statute from having points assessed against their license. Certainly the protective headgear an operator of a motorcycle is required to wear is not considered vehicle equipment and does not come within this exemption. If the legislature had intended to exempt persons convicted of violating this provision of the statute, it could have done so by express provision.

Honorable Thomas A. David

CONCLUSION

It is the opinion of this office that points are to be assessed against the license of a person convicted of operating a motorcycle without wearing headgear approved by the Director of Revenue.

The foregoing opinion, which I hereby approve, was prepared by my assistant Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

SCHOOLS:

JUNIOR COLLEGE DISTRICTS: 1. The requirements of Section 178.810, RSMo Supp. 1967, relating to organization elections of junior college districts are met by giving notice by publication in any newspaper of general circulation in each county at the time and in the manner required by law.

2. The publisher's affidavit of publication of notice of the election is sufficient if it conforms to the requirements of Section 493.060 RSMo. There is no requirement that this affidavit be produced except as may be necessary under the circumstances to provide "sufficient evidence of the publication."

3. The recording by the State Board of Education of the copy of the order declaring the junior college district organized pursuant to Section 178.800, RSMo Supp. 1967, is sufficient to constitute notice to the county clerk and other county officials of the legal existence of the district.

OPINION NO. 125

May 28, 1968

Honorable William H. Bruce, Jr.
Prosecuting Attorney
Reynolds County Courthouse
Centerville, Missouri 63633



Dear Mr. Bruce:

This department is in receipt of your request for a legal opinion upon certain matters pertaining to the organization of Three Rivers Junior College District. Your inquiry may be summarized as follows:

- (1) Does Section 178.810 require publication in a newspaper actually published in each county included in the proposed junior college district?
- (2) What is required in the publisher's affidavit of publication? Can it be amended? When must it be filed?
- (3) What proof is required to be given to local county officials of the junior college district's official existence?

Honorable William H. Bruce, Jr.

Section 178.810, RSMo Supp. 1967, provides in part as follows:

"1. Notice of the organization election shall be given by the state board of education by publication in at least one newspaper of general circulation in each county including any portion of the proposed junior college district, . . ."

All Section 178.810, RSMo Supp. 1967, requires is, that notice be given "in at least one newspaper of general circulation in each county." The section neither specifically nor inferentially contains any requirement that the location or situs of the printing of the newspaper be within the county where notice is to be given. Absent such a requirement, such a restriction cannot be read into the statute. State ex rel Reorganized School District No. R-6 of Daviess County v. Holman, 275 S.W.2d 280 (En Banc 1955).

In response to your second question we refer you to Section 493.060, which states:

"When any notice or other advertisement shall be required, by law or the order of any court, to be published in any newspaper or made in conformity with any deed of trust or power of attorney, the affidavit of the printer, editor, or publisher, with a copy of such advertisement annexed, stating the number and date of the papers in which the same was published, shall be sufficient evidence of the publication."

This section neither prohibits amendments to such affidavits nor places any time limit upon the filing of such. The procedure authorized, moreover, is but one of several permissible methods of proving publication of a required notice. It has been held that the words "shall be sufficient evidence of the publication" permits proof by means other than by a printer's affidavit specifically authorized by this section. Murphy v. Butler County, 180 S.W.2d 732 (1944); Spitcaufsky v. Hatten, 182 S.W.2d 86 (En Banc 1944). As these cases make plain, the proof of publication of a required notice may first be made at the time a direct attack is levied upon the validity of the notice, i.e., in the trial of a lawsuit attacking the validity of the general proposition for which the notice was given. By virtue of the words of the statute and the authorities construing it, then, it is plain that the elements of proof can be adduced in any one of several ways and within no certain time limit.

Your final inquiry pertains to the proof of the existence of the junior college district to local authorities. Section 178.800, RSMo Supp., sets forth the procedure and reads in part as follows:

Honorable William H. Bruce, Jr.

" * * * If the certificate of the secretary of the state board of education shows that the proposition to organize the junior college district has received a majority of the votes cast thereon, the state board of education shall make an order declaring the junior college district organized and cause a copy thereof to be recorded in the office of recorder of deeds in each county in which a portion of the new district lies. * * * "

Said order was duly made by the State Board of Education on May 6, 1966, and a copy thereof recorded the 10th day of May, 1966, in the office of the Recorder of Deeds of Reynolds County. Such recordation was in compliance with the provisions of Section 178.800, and constitutes notice to the county clerk and other county officials of the official existence of the district.

Your attention is invited to the case of Three Rivers Junior College District v. Statler, 421 S.W.2d 235, in which case the Supreme Court of Missouri discussed the authority of individuals to bring suit to determine the validity of the formation of the school district, stating l.c. 243:

"[11] As to the respondent's final contention the junior college district was illegally formed, such a challenge as here attempted cannot be maintained by county resident taxpayers by way of an injunction suit, but only by the state by quo warranto, as decided in State ex rel. Junior College District of Sedalia v. Barker, (Mo.Sup.banc) 418 S.W.2d 62."

CONCLUSION

It is the opinion of this office that:

1. The notice requirements of Section 178.810, RSMo Supp. 1967, relating to organization elections of junior college districts are met by giving notice by publication in any newspaper of general circulation in each county at the time and in the manner required by law.

2. The publisher's affidavit of publication of notice of the election is sufficient if it conforms to the requirements of Section 493.060 RSMo. There is no requirement that this affidavit be produced except as may be necessary under the circumstances to provide "sufficient evidence of the publication."

Honorable William H. Bruce, Jr.

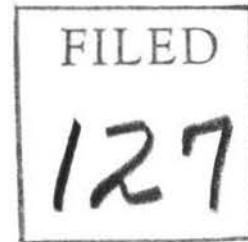
3. The recording by the State Board of Education of the copy of the order declaring the junior college district organized pursuant to Section 178.800 RSMo Supp. 1967, is sufficient to constitute notice to the county clerk and other county officials of the legal existence of the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant Rodney Weiss.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

January 5, 1968



OPINION NO. 127
464 (1967)
Answered by letter-
Brannock

Honorable Charles L. Bailey
Prosecuting Attorney
Moniteau County Court House
California, Missouri 65018

Dear Mr. Bailey:

We have your request for an opinion of this office which is as follows:

"The County Treasurer of Moniteau County has inquired of this office if it is permissible for her to assist the County Assessor in the performance of his duties."

We enclose herein the opinion of this office dated November 4, 1965, No. 152 addressed to the Honorable Haskell Holman, which we believe, answers your question. This opinion discusses clerical or stenographic assistance to highway engineers, superintendents of schools, prosecuting attorneys and magistrates in third and fourth class counties, and further discusses Section 54.100, RSMo 1959, relating to county treasurers and the interpretation thereof by the Missouri Supreme Court in State v. Cumpton, Mo., 240 S.W. 2d 877. The opinion held that such statute should be given a reasonable interpretation and does not require a county official to devote his entire time to the office, but if he sees to it that the duties of his office are properly performed, he complies with the statutes.

Honorable Charles L. Bailey

It is, therefore, the view of this office that a county treasurer of a third class county may properly assist the county assessor providing that the duties of the county treasurer are properly performed.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

AB:lch

Enclosure - Op. No. 152 - 11-4-65 - Holman

MOTOR VEHICLE LICENSES:
MOTOR VEHICLES:
LICENSES:
REGISTRATION:

(1) A change from individual to joint ownership of a motor vehicle or trailer in which the original owner is one of the joint tenants or tenants by the entirety terminates the right to use the registration plate issued for such vehicle and necessitates the purchase of a new registration plate for the motor vehicle or trailer.

(2) A change from joint ownership to individual ownership by one of the joint tenants or tenants by the entirety does not invalidate the continued use of the original registration plate or require the purchase of a new registration plate for the motor vehicle or trailer.

OPINION NO. 128

August 22, 1968



Honorable Thomas A. David, Director
Department of Revenue
State of Missouri
Jefferson City, Missouri 65101

Dear Mr. David:

You have requested the opinion of this office on the following questions involving the interpretation of Section 301.140 RSMo, 1959:

"May an individual transfer motor vehicle or trailer registration plates into a joint ownership when the individual will be one of the joint owners without the necessity of purchasing new registration plates?

"May a registration plate on a motor vehicle or trailer now owned jointly be transferred out of the joint ownership without the necessity of purchasing a new plate when the individual owner was one of the joint owners?

"I would like to have the above questions answered in regard to family transfers and also when the persons involved are not related. We call your attention to your opinion number 21 issued November 2, 1967."

Honorable Thomas A. David

Section 301.140, Supra, provides in part that upon the "transfer of ownership" of any motor vehicle or trailer the right to use the registration plates shall expire and the plates shall be removed by the "owner" at the time of the "transfer of possession." The statute expressly declares it to be unlawful for any person other than the person to whom such number plates were originally issued to have the same in his or her possession whether in use or not. The statute further provides that in case of a transfer of ownership, the "original owner" of the motor vehicle or trailer may register another motor vehicle under the same number upon payment of a fee of two dollars.

It is thus apparent that in determining the applicability of Section 301.140, Supra, to any given factual situation, two questions are involved: (1) Has there been a "transfer of ownership" by the "original owner" within the meaning of the statute? and (2) Has there been a "transfer of possession" of the motor vehicle or trailer as contemplated by the statute, so that the person in possession of the plates is a person "other than the person to whom such number plates were originally issued?" The term "owner," as used in Chapter 301, RSMo, means "any person who holds the legal title of a vehicle." Section 301.010 (19) RSMo, 1959; Transport Rentals, Inc. v. Carpenter, Mo., 325 S.W. 2d 745, 749.

The opinion to which you directed our attention ruled that when a motor vehicle is registered in the name of an individual, such owner may not validly transfer his license plate to another individual (except for the period of 15 days following the sale of the vehicle), irrespective of the relationship between the parties. In the factual situation there ruled, every vestige of legal ownership as well as of possession has been transferred by the original owner of the motor vehicle, and the transferee is clearly a "person other than the person to whom such number plates were originally issued."

Your first question relates to a change from individual ownership to joint ownership between the original owner and another. We assume that by the term "joint ownership" you have reference to either a joint tenancy or a tenancy by the entirety. In either situation, the "original owner" retains an ownership interest as well as a possessory right.

"A joint tenancy is based on the theory that together the joint tenants have but one estate; they hold per my et per tout -- by the moiety or half and by the whole; the essential elements are the four unities of interest, title, time and possession. The leading and distinctive characteristic of an estate in joint tenancy is, of course, the right of survivorship." In re Gerling's Estate, Mo., 303 S.W.2d 915, 917.

In *Osterloh's Estate v. Carpenter*, Mo., 337 S.W.2d 942, the Supreme Court held that within the meaning of our inheritance tax laws, a transaction of this nature creating a joint tenancy is not a transfer of a property interest. The Court stressed the uncertainty and contingency at the time of the conveyance as to whether the new co-tenant would ever attain absolute ownership of the property and the accompanying right to exclusive possession. This decision was very carefully limited to the language of our "existing inheritance tax statutes." We have concluded, after a careful study of Section 301.140, *Supra*, that the rationale of *Osterloh's Estate* is not applicable in determining the legislative intent as to motor vehicle registration.

As stated above, one of the essential elements of a joint estate is unity of possession, that is, that the tenants have the same undivided possession. *Feltz v. Pavlik*, Mo. App., 257 S.W.2d 214, 218; 48 C.J.S., Joint Tenancy, §53c, page 916. *Osterloh's Estate* recognizes (337 S.W.2d, l.c. 946) that although neither joint tenant can hold exclusive possession against his co-tenant, each joint tenant does have the same right to possession. Such right of possession could be acquired by the new joint tenant only as an incident to the creation of the joint tenancy by the original owner. More importantly, the statute here for consideration makes it unlawful for any person other than the person to whom the number plate was originally issued to have the same in his or her possession. This prohibition evidences the legislative intent to include within the terms "transfer of ownership" and "transfer of possession" a transaction creating a joint tenancy between the "original owner" of a motor vehicle and another person. Since such other person cannot legally have the original number plate in his or her possession, because such person is a "person other than the person to whom such number plates were originally issued," it follows that a new registration plate must be obtained for the jointly owned motor vehicle. In our opinion, therefore, the "original owner" of a motor vehicle or trailer who creates a joint tenancy therein with another person has thereby effected a "transfer of ownership" of a kind terminating the right to further use the registration plate upon such motor vehicle or trailer.

As between husband and wife, the presumption would be that the joint owners of the motor vehicle are tenants by the entirety. Section 301.195 RSMo. Each tenant by the entirety is the owner of the entire estate, so that "(u)pon the death of one, the survivor continues to hold the whole title." *Linders v. Linders*, 356 Mo. 852, 204 S.W.2d 229, 232; See also *Murawski v. Murawski*, 240 Mo. App. 533; 209 S.W.2d 262, 264. And one of the unities characterizing such an estate is unity of possession. *Stewart v. Shelton*, Mo., 201 S.W.2d 395, 398. Hence, even though the individual spouse who originally owned the title to the motor vehicle would continue to do so after he created the tenancy by the entirety, the necessary present effect of such change in ownership is to transfer the entire title (together with possession) to his spouse so that such spouse as well as the "original owner" will own and be in possession of the motor vehicle.

Since such spouse is not a person to whom the number plate was "originally issued" and hence may not lawfully have the same in his or her possession, it is our opinion that the original number plate cannot validly continue to be used and a new registration plate must be purchased for the motor vehicle.

In answer to your first question, therefore, it is the opinion of this office that a transfer from individual ownership to joint ownership between the original owner and either his spouse or another person constitutes a "transfer of ownership" and possession within the meaning of Section 301.140, Supra, necessitating the purchase of a new registration plate for the motor vehicle or trailer.

Your second question involves the reverse situation. As for motor vehicles held by the entirety, we have noted that each spouse owns the entire estate, neither having a separate or joint interest. Since each spouse already is the owner of the entire title, it follows that when the interest of the other spouse is eliminated, whether by death or otherwise, the title of the remaining spouse continues unchanged. And since each spouse already has the full right of possession of the motor vehicle together with the right to use the original number plate, the change to individual ownership by one of the spouses does not affect the existing right of possession other than to enhance it. In our opinion, the elimination of the interest of one spouse does not operate as a "transfer of possession" to the other spouse within the intent of the statute. Hence, the remaining spouse may continue to use the original number plate.

We believe the same result follows in the case of a joint tenancy. In the event of the death of one joint tenant, the survivor whose title is thereby enhanced does not take a new title, but instead continues to hold the whole title by virtue of the original transaction which created the joint tenancy. In re Gerling's Estate, Mo., 303 S.W.2d 915, 917; Osterloh's Estate v. Carpenter, Mo., 337 S.W.2d 942, 946. Of major importance is the fact that prior to the elimination of the interest of one co-tenant, the other co-tenant had the lawful right to possess and use the original registration plate. Although the elimination of his co-tenant's interest enables the remaining co-tenant to come into complete and exclusive possession of the motor vehicle, the result is merely to "enhance" his existing possessory right. One cannot "transfer" possession to a person who already has possession. Since the remaining co-tenant is one of the persons to whom the number plate was originally issued, he may continue to use the same on the motor vehicle with respect to which the plate was issued after the termination of the ownership and possessory interest of the other co-tenant.

CONCLUSION

It is the opinion of this office that:

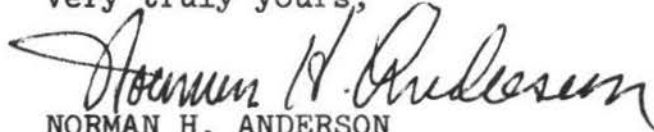
Honorable Thomas A. David

(1) A change from individual to joint ownership of a motor vehicle or trailer in which the original owner is one of the joint tenants or tenants by the entirety terminates the right to use the registration plate issued for such vehicle and necessitates the purchase of a new registration plate for the motor vehicle or trailer.

(2) A change from joint ownership to individual ownership by one of the joint tenants or tenants by the entirety does not invalidate the continued use of the original registration plate or require the purchase of a new registration plate for the motor vehicle or trailer.

This opinion which I hereby approve was prepared by my assistant Mr. Thomas J. Downey.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON
Attorney General

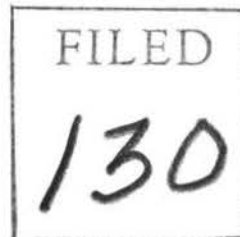
May 9, 1968

Opinion No. 130

Opinion No. 467(1967)

(Answered by Letter - Duff)

Honorable William J. Esely
Prosecuting Attorney of
Harrison County
P.O. Box 104
Bethany, Missouri 64424



Dear Mr. Esely:

This opinion is in response to your question whether certain real estate, owned by North Harrison Reorganized School District III, is exempt from taxation.

The Missouri Constitution specifically provides that, "All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation;" MO. CONST. article X, § 6. Section 137.100 (2), RSMo 1959, makes a similar exemption.

Article X of the Constitution, section 15, defines the term "other political subdivision", to include school districts. "The term 'other political subdivision,' as used in this article, shall be construed to include townships, cities, towns, villages, school, road, drainage, sewer and levee districts and any other public subdivision, public corporation or public quasi-corporation having the power to tax." MO. CONST. article X, § 15. There is no question that a public school district is a political subdivision of the state. *Smith v. Consolidated School District No. 2*, 408 S.W. 2d 50 (1966).

Article X, § 15, is new in the Constitution of 1945. However, a school district's land was exempt from taxation even under the previous constitution. The Constitution of 1875 provided that, "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. . . ." MO. CONST. article X, § 6 (1875). The term "Municipal Corporation" was interpreted broadly to include a public school district. Attorney General's Opinion No. 51, issued to the

Honorable William J. Esely

Honorable Marion E. Lamb, September 13, 1939, held a school district is a "municipal corporation" and all its lands are exempt from taxation under the MO. CONST. article X, § 6 (1875).

A public school district is a political subdivision of the State and all its land is exempt from taxation under the MO. CONST. article X, § 6.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

DD:lch

THIRD CLASS CITY:
CITIES, TOWNS, VILLAGES:
CITY COUNSELOR:
"MINISTERIAL":

The City Counselor of a third class city is required to be a resident of said city.

OPINION NO. 132
NO. 469 (1967)

February 27, 1968



Honorable Stanley Braton
Prosecuting Attorney
Johnson County
Warrensburg, Missouri 64093

Dear Mr. Braton:

In your request for an opinion you state the problem as follows:

"May a city of the third-class, which has, under Section 98.340 V.A.M.S., established the office of City Counsellor, and set forth the duties of such City Counsellor by ordinance as follows:

'The City Counsellor shall represent the City in all cases in all Courts of record in this State; shall draft and approve all ordinances, contracts and legal forms of every kind, and perform such duties as shall be prescribed by ordinance or shall be ordered by the Council or mayor. ---The City Counsellor shall be Ex-officio City Attorney in case of the absence, disqualification, disability or resignation of the elected City Attorney.'

appoint, hire, retain and employ to the appointive office of City Counsellor, an attorney who is not a resident of or voter in said third-class city, said appointment having been made by the City Council of such city under purported authority of Senate Bill 39, now Section 77.380 V.A.M.S., as an appointment to an office having only 'ministerial' duties? The city involved has no elected City Attorney, the previous elected City Attorney having resigned and no election held to select a replacement."

Honorable Stanley Braton

Section 77.380, RSMo 1959, formerly required that:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state and the ordinances of the city, and, except the city sextons, must be residents of the city. * * * "

Senate Bill No. 39, 74th General Assembly, repealed Section 77.380, RSMo 1959, and enacted in lieu thereof Section 77.380, RSMo Cum Supp 1967, which reads as follows:

"All officers elected or appointed to offices under the city government shall be qualified voters under the laws and constitution of this state, and except the city sextons, appointed police officers, and other employees having only ministerial duties, must be residents of the city. * * * "
(Emphasis added)

In order for a non-resident to be elected or appointed to an office within the city government, the office must fall with the exceptions: " * * * city sextons, appointed police officers, and other employees having only ministerial duties, * * * ". The question may thus be confined to whether the City Counselor is an "employee having only ministerial duties".

Black's Law Dictionary, 4th Ed., 1951, defines "ministerial" as:

"That which is done under the authority of a superior; opposed to judicial; that which involves obedience to instructions, but demands no special discretion, judgment or skill."

Black's, supra, defines "ministerial duty" as:

"One regarding which nothing is left to discretion -- a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist."

In order to determine whether the City Counselor is an "employee having only ministerial duties," we must refer to Section 98.340, RSMo 1959, which prescribes his duties as follows:

"In any suit or action at law or in equity brought by or against the city except in prosecutions begun before the police judge,

Honorable Stanley Braton

the city council may, by resolution, employ an attorney or attorneys, and pay him or them a reasonable fee therefor; provided, that any city may, by ordinance, provide for the office of city counselor and his duties and compensation. Such city counselor, when so provided for, shall represent the city in all cases in all courts of record in this state; shall draft all ordinances and contracts and all legal forms of every kind, and give legal advice to the council and other officers of the city, and perform such other duties as shall be prescribed by ordinance or shall be ordered by the council or the mayor. In any city where there is a city counselor, the duties of the city attorney shall be such as may be prescribed by ordinance." (Emphasis added)

Thus, it can be seen that the duties of the City Counselor involve a large amount of discretion and cannot reasonably be classified as "ministerial". He is a legal advisor to the city council and manages litigation in which the city is a party. Although he is under the supervision of the city council, he possesses the powers of free decision and a wide latitude in discharging his responsibilities of advising city officers and drafting legal instruments. Official action . . . is ministerial when it is absolute, certain and imperative, involving merely the execution of a set task, and when the law which imposes it prescribed and describes the time, manner and occasion of the performance with such certainty that nothing remains for judgment or discretion. McQuillin, Munic, Corp., 3rd Ed. Revised, Section 10.32.

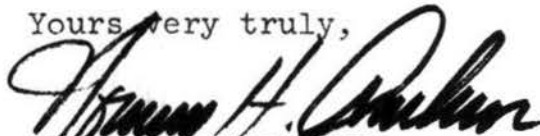
We therefore conclude that a city counselor of a third class city is not an "employee having only ministerial duties" and as a result must be a resident of the city.

CONCLUSION

It is the opinion of this office that the City Counselor of a third class city is required to be a resident of said city.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Steve Weber.

Yours very truly,

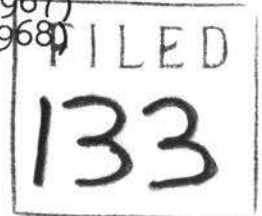

NORMAN H. ANDERSON
Attorney General

CRIMINAL COSTS:
INDIGENT PERSONS:
POOR PERSONS:

(1) The county is not obligated to pay the medical bills of an indigent defendant who sustains injury during the commission of a crime and is hospitalized for said injury; (2) The county court does have authority to make payment of hospital bills of indigent defendants, but the payment may not be taxed as costs in the criminal case; and (3) Hospital bills incurred by an indigent defendant during the commission of the crime may not be taxed as costs in the criminal case.

OPINION NO. 470 (1967)
133 (1968)

May 2, 1968



Honorable Richard J. Blanck
Prosecuting Attorney
Cooper County
Boonville, Missouri 65233

Dear Mr. Blanck:

This is in response to your opinion request which was stated as follows:

"(1) Is the County obligated to pay the medical bill of an indigent defendant who sustains injury during the commission of a crime and is hospitalized for said injury where no criminal charges are filed against said indigent defendant until shortly prior to his dismissal from the hospital?

(2) Does the County Court have authority to make payment of hospital bills arising as set forth in question (1), and if they have such authority, and payment is made, may the same be taxed as costs in the criminal case and the County later reimbursed for the same?

(3) May hospital bills incurred under acts as set out in question (1) be taxed as costs in the criminal case filed after the date of the indigent defendant's admission to the hospital?"

Honorable Richard J. Blanck

Enclosed is a copy of Opinion No. 31, dated January 26, 1965, issued to the Honorable Paul D. Hess, Jr., which was previously issued by this office. This opinion serves to answer your questions numbered 1 and 3 in that it rules that neither the state nor the county can be held liable for these costs.

With regard to question number 2 concerning the authority of the county to pay these costs, it seems that Chapter 205, concerning County Health and Welfare Programs, provides this authority. The specific sections which are applicable are:

"205.580. County to support poor.--
Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

"205.610. County court to provide support of poor. -- The county court of each county, on the knowledge of the judges of such tribunal, or any of them, or on the information of any magistrate of the county in which any person entitled to the benefit of the provisions of sections 205.580 to 205.760 resides, shall from time to time, and as often and for as long a time as may be necessary, provide, at the expense of the county, for the relief, maintenance and support of such persons."

"205.620. Court shall use its discretion.--
The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

These sections clearly give the county court discretionary authority to pay these medical bills, but if the court does decide to pay, such payments cannot be taxed as costs for the same reasons as are enumerated in the Hess opinion mentioned above.


CONCLUSION

Therefore, it is the opinion of this office that: (1) The county is not obligated to pay the medical bills of an indigent defendant who sustains injury during the commission of a crime and is hospitalized for said injury; (2) The county court does have authority to make payment of hospital bills of indigent defendants, but the payment may not be taxed as costs in the criminal case; and (3) Hospital bills incurred by an indigent defendant during the commission of the crime may not be taxed as costs in the criminal case.

Honorable Richard J. Blanck

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

Enc--Op. No. 31; Hess; 1/26/65
Op.; Gullie; 10/26/49
Op.; Chamier; 10/12/38
Op.; Smith; 2/28/33

SPECIAL BENEFIT: County court of non-township
ASSESSMENT ROAD DISTRICTS: organization county cannot, under
BOUNDARIES CANNOT BE EXTENDED provisions of Section 231.010
OR LESSENEED: RSMo. 1959, change boundaries of
the special benefit assessment
road districts of county, organized under Sections 233.170 to
233.315, RSMo. 1959, taking territory from first district and
adding same to common road district of county, and taking terri-
tory from such common road district and adding it to said second
district.

OPINION NO. 134

April 18, 1968

Honorable Anthony McConnell
Prosecuting Attorney of
Christian County
Ozark, Missouri 65721



Dear Mr. McConnell:

This office is in receipt of your request for a legal opinion upon the facts stated in your letter which are said to involve a problem arising out of a conflict of Missouri statutes pertaining to the county court's powers to add or take away territory of special road districts, under Sections 233.170 to 233.315 RSMo. 1959. It appears the alleged conflict is between Sections 231.010 and 233.170 RSMo. 1959.

From the factual situation given in the opinion request, special road districts of your county, referred to as "X" and "Y", were organized and exist under and by virtue of Sections 233.170 to 233.315 RSMo. 1959, governing the organization, management and dissolution of special benefit assessment road districts of non-township organization counties.

Residents of special road district "X" desire the county court to change the boundaries of said district in such a manner that a part of its territory (amount not stated) will be taken away and returned to the common road district of the county.

At the same time, residents of special road district "Y" desire the county court to change the boundaries of the district

Honorable Anthony McConnell

in such a manner as to add territory of more than a mile square to the district.

We understand the specific inquiry of the opinion to be:

Can the county court of a non-township organization county, under provisions of Section 231.010 RSMo. 1959, change the boundaries of two special benefit assessment road districts of the county, organized under provisions of Sections 233.170 to 233.315, RSMo. 1959, in such a manner as to take territory from the first special road district and add it to the common road district of the county and also to take territory from such common road district and add it to the second special road district?

Section 231.010 RSMo. 1959 reads as follows:

"The county courts of all counties, other than those under township organization, shall during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

Section 233.170 RSMo. 1959 provides that county courts may form special road districts and reads as follows:

"1. County courts of counties not under township organization may divide the territory of their respective counties into road districts, and every such district organized according to the provisions of Sections 233.170 to 233.315 shall be a body corporate and possess the usual powers of a public corporation for public purposes, and shall be known and styled '_____ road district of _____ county', and in that name shall be capable of suing and being sued, of holding such real estate and personal property as may at any time be either donated to or purchased by it in accordance with the provisions of Sections 233.170 to 233.315, or of which it may be rightfully possessed at the time of the passage of Sections 233.170 to 233.315 and of contracting and being contracted with as herein provided.

2. Districts as organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least

Honorable Anthony McConnell

six hundred and forty acres of contiguous territory; provided, that the county courts shall not have power to divide the territory within the corporate limits of a city having a population of one hundred fifty thousand into such road district."

A special benefit assessment road district referred to in Section 233.170, supra., may be organized under the procedure provided by Sections 233.170 to 233.315, but for our present purpose it will be unnecessary to discuss the details of such procedure, except to say that same is begun with the filing of a petition for organization of the proposed district, with the county court of the county in which such proposed district is located. The petition shall contain a majority of the signatures of landowners, the number of acres of land of each owner, and total acreage of the district and boundaries of the proposed district.

If no remonstrances of such landowners are filed, or if file are overruled, then in due time and in accordance with the statutory procedure, the county court shall enter its order of record incorporating the special road district as a political subdivision of the state for governmental purposes, and with the powers conferred upon it by law, especially those provided by Section 233.175.

A careful examination of Sections 233.170 to 233.315 reveals the county court has not been granted any power by said sections to alter the boundaries of a special road district in such a manner as to add or take territory from the district after its incorporation as the court may desire. In the absence of any statutory grant to the county court to alter the boundaries of a special road district as stated above, the county court lacks such power and cannot alter the boundaries of the road district in any manner.

While it is true, Sections 233.290 and 233.295 provide the statutory procedure which may be instituted in the county court for disincorporating a special road district, but in no way does it authorize the court to take territory from or to add territory to a special road district which is still legally in existence.

Section 231.010, supra., authorizing the county courts of all non-township organization counties to change the boundaries of the road districts of the county as the public interests may require, has reference to the common road districts, as is pointed out in opinions of this office written for Honorable Mayte B. Hardie, Prosecuting Attorney of Christian County, Missouri, on March 8, 1966 (150-1966) and Honorable Bernard Simcoe, State Representative, Callaway County, Missouri, on February 7, 1964 (35-1964), copies enclosed.

The road districts mentioned in Section 233.170, supra., have reference only to special benefit assessment road districts, govern-

Honorable Anthony McConnell

ed by Section 233.170 to 233.315 RSMo. 1959. They are not the same, nor do they have any connection or relation to the common road district referred to in Section 231.010, supra. Consequently, there is no conflict between Section 231.010 and 233.170, supra.

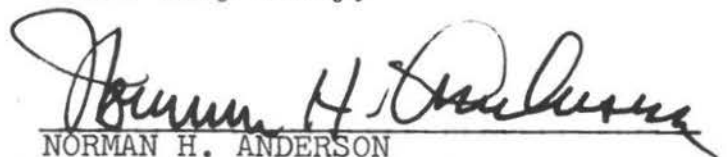
In view of the foregoing, our answer to your inquiry is that the county court of a non-township organization county has been granted no power, and cannot, under provisions of Section 231.010 RSMo. 1959, change the boundaries of two special benefit assessment road districts of such county, organized under provisions of Section 233.170 to 233.315 RSMo. 1959, in such a manner as to take territory from the first district, and add same to the common road district of the county, and take territory from the common road district and add it to said second district.

CONCLUSION

Therefore, it is the opinion of this office that the county court of a non-township organization county has not been granted the power under provisions of Section 231.010 RSMo. 1959, to change the boundaries of two special benefit assessment road districts of the county, organized under provisions of Section 233.170 to 233.315 RSMo. 1959, in such a manner as to take territory from the first district and add it to the common road district of the county, and take territory from such common road district and add it to the second district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

Enclosures: Opinion 150-1966, Hardie
Opinion 35-1964, Simcoe

May 21, 1968

OPINION NO. 472
135 (1968)
Answered by Letter
(Stevens)

Honorable John P. Ryan
State Senator - 8th District
Missouri Senate
7636 Lydia Street
Kansas City, Missouri 64131



Dear Senator Ryan:

Your letter requesting an official opinion from this office is as follows:

Re: Section 105.470

"Does the above section apply to an officer, director, or a full time employee of a corporation which has sent one or more of these parties to Jefferson City to attempt to influence members of the Legislature in proposed pending legislation?

"Some of these parties merely come into the Legislature and shake hands and say they are with such and such a company and they are interested in the passage of a particular bill, and they do not attempt to entertain the members of the Legislature."

Honorable John P. Ryan

We believe that this question is answered by Opinion No. 87, issued March 17, 1966, to Honorable Judge John H. Wolfe, a copy of which is enclosed.

The statute in question is as follows:

"Any person who engages himself for pay or for any valuable consideration for the purpose of attempting to influence the passage or defeat of any legislation by the general assembly of Missouri or who expends money for such purposes shall, before doing anything in furtherance of the object, register with the chief clerk of the house of representatives and the secretary of the senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, and the duration of the employment." * * * *

The language of the statute is all-inclusive and only one exception is noted:

"* * * No state officer, or member of the general assembly shall be required to register under this section because of his lawful attempts to influence the passage or defeat of legislation solely in the course of his official duties." * * * *

As stated in the opinion: Any person (other than those persons specifically excluded) meeting the two requirements of (1) engaging himself for pay or valuable consideration and (2) who attempts to influence the passage or defeat of any legislation by the General Assembly, comes within the purview of the statute, as well as those persons meeting the separate criterion of expending money for the purpose of influencing legislation.

To paraphrase the language used in the opinion: The instant situation is that of an employee of a corporation whose general duties have no reference to legislative matters but may from time go to Jefferson City to oppose, support, or alter a specific bill which may affect the interest of the corporation. He speaks with legislators, testifies, if necessary, before committees and exerts

Honorable John P. Ryan

whatever persuasion he can to prevent or promote legislation of interest or concern to the corporation. Immediately after the bill has been altered, passed or defeated he returns to his usual duties.

To paraphrase further: The corporation or the employee of the corporation might argue that he was not employed to influence legislation and that this is not his principal activity. Under the present Missouri statutes the argument that his legislative activities are merely incidental to his primary activities is without merit. We assume that part of his duties are legislative in nature and thus part of his compensation is derived for such activities. He is acting in his official capacity and not as an individual since it is in the interest of the corporation which is affected by the pending legislation.

Although over a long period of time his principal activity may be with other corporation affairs nevertheless if he attempts to influence legislation or expends money attempting to influence legislation, it falls within the orbit and regulation of the statute.

In accordance with the reasoning in this opinion, this office must hold that an officer, director or employee of a corporation who goes to Jefferson City and attempts to influence the passage or defeat of legislation in the General Assembly of Missouri, or expends money for that purpose is regulated by the provisions of Section 105.470, RSMo Supp. 1965.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure - Op. 87, Wolfe, 3/17/66

CHS:fb

Honorable Bob F. Griffin-

Opinion No. 137 (1968)
No. 475 (1967)
Answered by Letter (Klaffenbach)

May 13, 1968

Honorable Bob F. Griffin
Prosecuting Attorney
Clinton County
223 East Third Street
Cameron, Missouri 63156



Dear Mr. Griffin:

This is in response to your inquiry which is as follows:

"Please furnish me with an opinion from your office concerning the revocation of an individual's Operator's License by the Director of Revenue under the provisions of Section 564.444, R.S.Mo., 1959 for refusal to submit to chemical test (breathalyzer) upon affidavit filed by arresting officer attesting to an individual's refusal to submit to said chemical test, under the following situation:

"1. The arresting officer advised the subject and did attest to having given said warning in his affidavit filed with the Director of Revenue; that 'said arrested persons driver's license may be revoked for one year upon his refusal to take the test, all as is provided in Section 564.444, R.S.Mo., 1959; but did not in fact advise said arrested person and the affidavit made by the officer did not attest to having given said advice to the effect 'that said arrested persons driver's license would be revoked for one year upon his refusal to take the test.'

"It would appear to me from an examination of the applicable law in this instance that the Director of Revenue has no choice or discretion in a case where the arrested person has in fact refused to take the chemical test and

Honorable Bob F. Griffin -

in accordance with the specific language of Section 564.444 R.S.Mo., 1959, 'upon receipt of the officer's report, the Director shall revoke the license of the person refusing to take the test for a period of not more than one year;' and therefore, it would appear to me that an arresting officer giving the advice set forth in said Section, although complying with said Section, would not in fact be properly advising the arrested person of his rights and the consequence of his refusal to submit to a chemical test."

As you state, Section 564.444, RSMo Supp., does use the term "may" in that, that section requires that the officer inform the person under arrest that his driver's license "may" be revoked upon his refusal to take the test. You are also quite right in that the affidavit used by the officer, pursuant to that section, which is directed to the Director of Revenue, also uses the term "may" and is a verification that the arrested person was informed that "his driver license may be revoked for 1 year upon his refusal to take the test."

We have examined comparable laws of other states and find that in some the police officer is instructed to advise the arrested person that his license will be revoked and in others there is no requirement that the person be advised in any manner. We recognize that in some instances the legislature uses the term "may" with an obvious intent that it have the same meaning as "shall." In the premises, however, there is no reason to conclude that the legislature meant anything other than they actually declared.

While it may well be that due regard to caution and fair play might dictate that the word "will" or "shall" might have been preferred, nevertheless it was not used and the failure to use it cannot be said to render the statute invalid or unconstitutional. Our courts have not held precisely on this point. However, it was held in Blydenburg v. David, 413 S.W.2d 284 (1967), at l.c. 290, that a license to operate a motor vehicle may be suspended or revoked by an administrative agent authorized by law to do so without prior notice or hearing since due process of law is satisfied if there is provision for an administrative hearing subject to judicial review or the right to have a hearing in a court which may adequately review the administrative decision. The implied consent laws are in fact civil in nature. Blydenburg, supra, l.c. 290.

Honorable Bob F. Griffin -

We conclude that the only appropriate advice that the arresting officer can give is that prescribed by law and in this case, couched in the language of the statute. Absent any violation of due process, any change remains a legislative prerogative.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

JCK:df

COUNTY HEALTH AND WELFARE
PROGRAMS:
ECONOMIC OPPORTUNITY:

Counties may expend funds to provide
quarters for community action agencies
operating under the federal Economic
Opportunity Act.

OPINION NO. 479 (1967)
141 (1968)

March 21, 1968



Honorable William Baxter Waters
State Senator, 17th District
First National Bank Building
Liberty, Missouri

Dear Mr. Waters:

We acknowledge your recent request for an official opinion
on the legality of counties furnishing quarters, directly or in-
directly, to Community Action Agencies.

The Economic Opportunity Act of 1964 (PL 88-452, 1964; as
amended, PL 89-253, 1965; PL 89-794, 1966) contains a sub-chapter
on urban and rural community action programs. 42 USCA §2781-2831.
A "Community Action Program" is therein defined as a program "(1)
which mobilizes and utilizes resources, public or private in any
urban or rural, or combined urban and rural, geographical area..
for an attack on poverty; (2) which provides services, assistance,
and other activities of sufficient scope and size to give promise
of progress toward elimination of poverty or a cause or causes of
poverty through developing employment opportunities, improving
human performance, motivation, and productivity, or bettering
the conditions under which people live, learn, and work; (3) which
is developed, conducted, and administered with the maximum feasible
participation of residents of the areas and members of the groups
served; (4) which is conducted, administered or coordinated by a
public or private nonprofit agency (other than a political party)
or a combination thereof;" 42 USCA §2782.

Honorable William Baxter Waters

In authorizing the Director of the Office of Economic Opportunity to make grants to community action agencies the following statutory criteria has been imposed.

"(a) The Director is authorized to make grants to, or to contract with, public or private nonprofit agencies, or combinations thereof, to pay part or all of the costs of community action programs which have been approved by him pursuant to this part, including the cost of carrying out programs which are components of a community action program and which are designed to achieve the purposes of this part. Such component programs shall be focused upon the needs of low-income individuals and families and shall provide expanded and improved services, assistance, and other activities, and facilities necessary in connection therewith. Such programs shall be conducted in those fields which fall within the purposes of this part including but not limited to, employment job training and counseling, health, vocational rehabilitation, housing, home management, welfare, and special remedial and other non-curricular educational assistance for the benefit of low-income individuals and families.
* * * * "42 USCA §2785

Finally, we note that the Director of Economic Opportunity Act has defined a community action agency under the act as a "recipient of aid that is organized on a community wide basis and intends to coordinate a variety of anti-poverty actions." (45 C.F.R., Section 1030.5[a-1]).

With this general statement of federal law, we proceed to an examination of the Missouri statutes of a related nature. Four sections of our present statutes (Sec. 205.580, 205.590, 205.600 and 205.610, RSMo 1959), which descend from the territorial laws, are pertinent to the subject under discussion, and two of these sections are set out herewith in full;

"Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants." (Section 205.-580)

Honorable William Baxter Waters

"Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there are no other persons required by law and able to maintain them, shall be deemed poor persons." (Section 205.590)

We consider these laws to have been enacted in the interest of public welfare and to be regarded as humanitarian or grounded on a humane public policy. Accordingly, they are to receive a liberal construction. (82 C.J.S., Statutes, Section 387, page 916; State ex rel Laundry Inc. vs. Public Service Commission, Mo. 34 SW 2d 37 [Division 1, 1931]).

More particularly, the rule in construing statutes relating to the poor has been stated as follows:

"* * * Statutes relating to the relief of paupers are neither in terms nor spirit limited to the relief of chronic or permanent paupers, or any other class of poor persons, but extend to every person coming within the terms of the statute dependent on public assistance for the necessities of life. Hence, such statutes may apply to persons becoming indigent through unemployment because of an economic depression.* * *" (70 C.J.S. Paupers, Section 1, page 6)

"* * * the obligation of supporting needy citizens is a humanitarian one which the state may voluntarily assume or may impose on local governmental units.* * *"

(70 C.J.S., Paupers, Section 3, Page 10; emphasis added)

The first of the above quotations refers to, among other cases, Jennings vs. City of St. Louis, Mo., 58 SW 2d 979 [En banc 1933] in which the following language is found, l.c. 981:

"It necessarily follows that an able bodied man, who is unable to obtain employment on account of the economic conditions existing at the time, and who is without means of support, is entitled to public relief."

Honorable William Baxter Waters

Thus, we construe Section 205.580 to be an authorization to the counties to expend funds in connection with the Community Action program under the Economic Opportunity Act. We do not construe Section 205.590 as a limitation of Section 205.580, but rather as a statement of particular classes, among others, to which the statute shall apply.

"* * *Where the statute contains an enumeration of certain things to which the act applies and also a general expression concerning application of the act, the general expression may be given effect if the context shows that the enumeration was not intended to be exclusive. So the maxim [Expression unius est exclusio alterius] does not apply to a statute the language of which may clearly comprehend many different cases in which some only are mentioned expressly by way of example, and not as excluding others of a similar nature. The expression of one thing in a statute does not exclude another thing when the other thing also is expressed; nor will it generally exclude the application of the statute to things of the same class as those expressly mentioned which have come into existence since the passage of the statute." (82 C.J.S., Statutes, Section 333 b., page 670)

We deem it not amiss to also refer to Section 288.340, RSMo 1959, wherein, under the Employment Security Law of Missouri it is stated:

"(5) For the purpose of establishing and maintaining free public employment offices, the division is authorized to enter into agreements with any agency of the United States charged with the administration of an unemployment insurance law, with any political subdivision of this state or with any private, nonprofit organization, and as a part of any such agreement the division may accept moneys, services, or quarters as a contribution to the unemployment compensation administration fund."

Honorable William Baxter Waters

We perceive in this statute a further indication that the General Assembly of Missouri has intended that the counties may expend funds to alleviate those same problems with which the Economic Opportunity Act is concerned.

Finally, we note yet another statute which in our view manifests a legislative authorization for the cooperative agreements envisioned in your request.


"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. (Section 70.220, RSMo 1959; Emphasis supplied).

CONCLUSION

Therefore, it is the opinion of this office that counties may expend funds to provide quarters for community action agencies operating under the federal Economic Opportunity Act.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louren R. Wood.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

ROADS AND BRIDGES:
COUNTY BUDGET:

General county revenue funds may be budgeted and expended for the purchase of road machinery, repair and upkeep of bridges other than on state highways and not in special road districts, and for the construction and maintenance of roads.

May 2, 1968

OPINION NO. 147



Honorable Haskell Holman
State Auditor
State of Missouri
Jefferson City, Missouri 65101

Dear Mr. Holman:

This is in answer to your request for an opinion which is as follows:

"Under the provisions of Section 50.550 RSMo., 1959, are county courts of all third and fourth class counties authorized to appropriate and subsequently make expenditures from the general county revenue fund, said fund being that derived from the annual tax levied for county purposes as provided and limited by the provisions of Section 137.065 RSMo., 1959, for the following purposes?

1. For the purchase of road machinery?
2. For the repair and upkeep of bridges other than on state highways and not in any special road district?
3. For the construction and maintenance of roads?"

On January 1, 1967, Section 50.540, RSMo Supp. 1967, became applicable also to third and fourth class counties. Under subsection 4 of Section 50.540, supra, the budget officer prepares the county budget in the form prescribed by Section 50.550, RSMo 1959, etc.

Section 50.550, is as follows:

Honorable Haskell Holman

"The annual budget shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects. The budget shall contain adequate provisions for the expenditures necessary for the care of insane pauper patients in state hospitals, for the cost of holding elections and for the costs of holding circuit court in the county that are chargeable against the county, for the repair and upkeep of bridges other than on state highways and not in any special road district, and for the salaries, office expenses and deputy and clerical hire of all county officers and agencies. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. All receipts of the county for operation and maintenance shall be credited to the general fund, and all expenditures for these purposes shall be charged to this fund; except, that receipts from the special tax levy for roads and bridges shall be kept in a special fund and expenditures for roads and bridges may be charged to the special fund. All receipts from the sale of bonds for any purpose shall be credited to the bond fund created for the purpose, and all expenditures for this purpose shall be charged to the fund. All receipts for the retirement of any bond issue shall be credited to a retirement fund for the issue, and all payments to retire the issue shall be charged to the fund. All receipts for interest on outstanding bonds and all premiums and accrued interest on bonds sold shall be credited to the interest fund, and all payments of interest on the bonds shall be charged to the interest fund. The county court may create other funds as are necessary from time to time."

Honorable Haskell Holman

Under the previous county budget law which classified county expenditures in various classes and which provided that monies derived from the road and bridge tax should be placed in Class 3, it was held in the Case of State ex rel vs. Cribb 273 S.W.2d 246, that road working machinery could be purchased from General County Revenue placed in Class 5 of the County Budget.

In the Case of Everett vs. Clinton County, 282 S.W.2d 30, the Supreme Court held that expenditures for rentals or purchase of road machinery could be paid from Class 5 of the county budget from County General Revenue Funds.

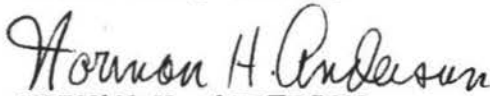
It appears that the purchase of road machinery, repair and upkeep of bridges other than on state highways and not in special road districts and for the construction and maintenance of roads are normal and proper expenditures of the county general revenue fund, and may be so budgeted. There is no prohibition against spending such funds for the purposes enumerated in your request.

CONCLUSION

It is therefore the opinion of this office that general county revenue funds may be budgeted and expended for the purchase of road machinery, repair and upkeep of bridges other than on state highways and not in special road districts, and for the construction and maintenance of roads.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Arnold Brannock.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

COUNTY HEALTH CENTER: The question of establishment of a county
ELECTIONS: health center may be submitted to the electorate
on the day of the August primary election because
such election is a "general election" within the
meaning of Section 205.010, RSMo 1959.

OPINION NO. 151

May 29, 1968



Honorable Edison Kaderly
Prosecuting Attorney
Barton County Courthouse
Lamar, Missouri 64759

Dear Mr. Kaderly:

This opinion is written to respond to your inquiry whether the county court can submit the question of the establishment of a county health center on the day of the August primary election.

The pertinent statute, Section 205.010, RSMo 1959, reads as follows:

**"Petition of voters--special election--
maximum tax rate.--** Any county, subject to the provisions of the constitution of the state of Missouri, may establish, maintain, manage and operate a public health center in the following manner: Whenever the county court shall be presented with a petition signed by at least ten per cent or more of the qualified voters of the county, . . . the county court shall submit the question to the qualified voters of the county at the next general election to be held in the county or at a special election called for the purpose, the county clerk giving notice, published once each week for two consecutive weeks prior to such election date, * * *"

We assume, of course, that a petition of at least 10 per cent or more of the qualified voters of your county has been presented to the county court.

This would be a precedent requirement to the presenting of this question to the voters under Section 205.010, RSMo 1959. We note, in passing, under our Opinion 88, dated May 20, 1953,

Honorable Edison Kaderly-

addressed to the Honorable Joe Taylor, that it is mandatory upon the county court to "submit the question to the qualified voters of the county at the next general election to be held in the county or in a special election called for that purpose." The opinion is enclosed.

The August primary election is fixed by Section 120.310. The question is whether the primary election is a "general election" within the meaning of Section 205.010, RSMo 1959.

We recognize that "general election" is defined by Section 1.020, RSMo 1959, as the election required to be held on the Tuesday succeeding the first Monday of November, biennially. However, we do not believe the term "general election" as used in Section 205.010 (supra), means or is limited to this one date. This calls for the statutory construction of the words "general election" to determine legislative intent. It does not require a strained or narrow interpretation so as to defeat its object, but we must consider all the statutes even though found in different chapters and enacted at different times. See State ex rel. Schwab v. Riley, 417 S.W.2d 1.

A discussion of what is a general election appears in the case of Dysart v. City of St. Louis, 11 S.W.2d 1045, 1052:

"But the definition of 'general election' is settled by an amendment to the Constitution adopted in 1920 (see Laws 1921, p. 703), by which section 12 of article 10 was repealed, and another section by the same number adopted. It provides:

"'No county, city, town, township, school district or other political * * * subdivision of the State shall * * * become indebted,' except by a two-thirds vote at an election held for that purpose; and 'such proposition may be submitted at any election, general or special.'"

"It follows that any local election, city, county, etc., may be either general or special, and this wipes out the definition of 'general election' in section 7058, or limits the implied distinction to state elections.

"It necessarily means that a special election is one called for a special purpose, not one fixed by law to occur at regular intervals. A primary election and a regular election are connected together in section 35 in regard to general registration, with the same requirement for a revision before a primary election as there is before a final election to elect

Honorable Edison Kaderly -

officers. Therefore it avails nothing to distinguish a primary election from the statutory definition of any other general election."

It is our view that the term "general election" as used in Section 205.010, RSMo 1959, means any general county election. The question of the electorate determining whether to adopt a county health center can be submitted to the electorate at the primary election because it is a general election. Accordingly, we conclude the question of a county health center should be presented to the electorate at the primary election August 6, 1968, since it is the next "general election", unless it is submitted at a special election called for the purpose of submitting such question.

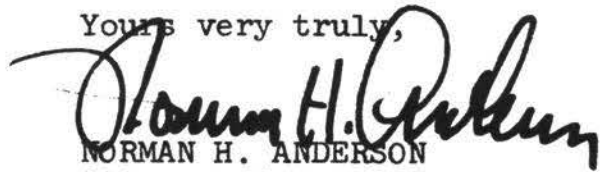
CONCLUSION

It is the opinion of this office that:

The question of establishment of a county health center may be submitted to the electorate on the day of the August primary election because such election is a "general election" within the meaning of Section 205.010, RSMo 1959.

The above opinion which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

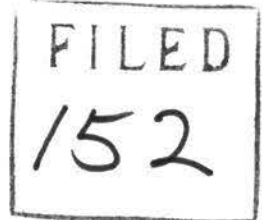
Enclosure: Opinion 88, 5-20-53,
to Taylor.

FOURTH CLASS CITIES:
CITIES, TOWNS, AND VILLAGES:

A fourth class city can legally engage in the operation of an intra-city bus system and can make use of surplus city funds if additional revenue would be required.

OPINION NO. 152

February 6, 1968



Honorable E. J. Cantrell
State Representative - District 33
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri 65101

Dear Representative Cantrell:

You have requested this office for an opinion concerning the power of a fourth class city to engage in the operation of an intra-city bus system which operation would contemplate the use of city funds if additional revenue would be required.

The powers of a municipality are derived from a delegation of power by the state. A fourth class city has only those powers conferred by the state in statutes. State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S.W.2d 929.

The question with which you are concerned seems to be sufficiently covered by Section 91.450, RSMo 1959, pertinent portions of which follow:

"Any city of the third or fourth class, and any town or village, and any city now organized or which may hereafter be organized and having a special charter, and which now has or may hereafter have less than thirty thousand inhabitants, shall have power to erect or to acquire, by purchase or otherwise, maintain and operate, waterworks, gas works, electric light and power plant, steam heating plant, or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system, public auditorium or convention hall, which are hereby declared public utilities, and such

Honorable E. J. Cantrell

cities, towns or villages are hereby authorized and empowered to provide for the erection or extension of the same by the issue of bonds therefor * * *

This section undoubtedly empowers the fourth class city to operate the contemplated bus system under the phrase "any other public transportation".

The question arises as to whether city funds could be used if additional revenue would be required. There appears to be no reason why this could not be done. Section 91.450, RSMo 1959, is silent on the subject except that the city is "authorized and empowered to provide for the erection and extension of same by the issue of bonds therefor".

In an Attorney General Opinion, dated April 18, 1956, (#41-Holman), the question was posed: may money in the general fund of a Fourth class city be used to purchase land to be used for a city hall or playground site? The opinion makes the following observations:

"This writer believes that the case of Decker vs. Diemer, 229 Mo. 296, 129 S.W. 936, even though the question therein concerned the authority of the county court to use surplus county funds, can be cited as authority for holding that the payment of land to be used for a city hall or playground site can be made from the general fund. Involved in the case was the transfer of surplus funds of the county to a courthouse fund for the purpose of constructing a courthouse. The court held that the transfer was not improper. Admitting that the statutes involved in the case were different from those involved in the question with which we are concerned in that the transaction was on the county level, yet the reasoning of the court can be applied to the question at hand. The court at l.c. 336, of the official report said:

' * * * We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a "surplus"

Honorable E. J. Cantrell

within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made.'

"There being no earmarking of the money in the general fund for any particular purpose, and no statutory provision as to the source from which payment for such land is to be made, the board of aldermen may use money in the general fund for the purpose of purchasing a tract of land to be used for a city hall or playground site." (Emphasis ours)

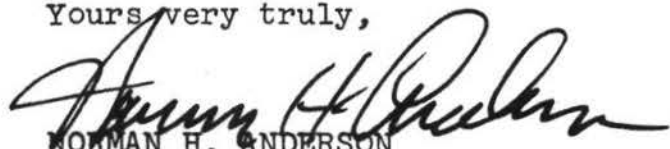
Furthermore, in Mathison v. Public Water Supply District No. 2, 401 S.W.2d 424, the court said that the grant of power to acquire a water system carries with it, by necessary implication, the authority to use money on hand as the means of payment and that it was not necessary that the city incur as indebtedness in order to acquire the water system. It follows that if the city maintains adequate funds to operate the bus system, there would seem to be no reason for the use of the bond issue. Subject to Section 94.250, RSMo 1959, establishing the maximum rate of tax, the city may operate the bus system even though the operation would contemplate the use of city funds if additional revenue were required.

CONCLUSION

A city of the fourth class can legally engage in the operation of an intra-city bus system, which operation would contemplate use of city funds if additional revenue would be required.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Steve Weber.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

MOTOR VEHICLES:
PICKUP TRUCK:
NOT EMERGENCY VEHICLE:
WHEN:

Privately owned pickup truck used in responding to calls for emergency service by motorists of stalled or disabled vehicles, which truck has only standard equipment put on at factory, without equipment for hoisting or towing vehicles at roadside, is not a "wrecker" or "tow truck" within meaning of Section 304.022, Paragraph 3, Subparagraph 3, RSMo. 1959.

Opinion No. 154-68

May 14, 1968

Honorable Albert F. Turner
Prosecuting Attorney
Wright County
P.O. Box 110
Mountain Grove, Missouri



Dear Mr. Turner:

This office is in receipt of your request for a legal opinion, reading in part as follows:

"We have a question concerning Section 304.022, Paragraph 3, Subparagraph 3. This section has to do with emergency vehicles. We recently had a case in Wright County involving a pickup that did not have any special equipment on it. It said "tow truck" on the side. It was equipped with emergency lights. It was used by a service station while making calls on traffic that might be stalled along the side of the road."

In a supplemental letter to the opinion request, you gave further and more detailed information regarding the matter of inquiry and it reads in part as follows:

"* * * you ask if I inquire if the tow truck is an emergency vehicle within the meaning of the statute you cite above * * * yes, that is my question.

You ask what I mean by emergency lights. The particular vehicle * * * had a small red flashing light on top of the cab of the pickup truck.

The particular situation that arises involves a privately owned pickup truck which is owned and operated part time in rendering services to motorists

who are stranded on the highway * * *. The vehicle has standard equipment the same as any other pickup truck that is obtained from the factory. The truck has no boom, no tow bar, and no compressor tank in the bed. The vehicle would have a wide wooden bumper for pushing stalled vehicles * * *."

We understand the inquiry of the opinion request to be whether a privately owned pickup truck with standard equipment put on at the factory, with exception of a red flasher light on the cab, is a "wrecker" or "tow truck", within the meaning of Section 304.022, Paragraph 3, Subparagraph 3, RSMo. 1959, providing that certain motor vehicles are emergency vehicles.

Section 304.022, RSMo. 1959, defines the terms "emergency vehicle" and grants exemptions from certain traffic regulations to the driver when the vehicle is being used as an emergency vehicle. Said section reads in part as follows:

"3. An 'emergency vehicle' is a vehicle of any of the following types:

(3) Any privately owned wrecker or tow truck or a vehicle owned and operated by a public utility service corporation while performing emergency service.

"4. (1) The driver of any vehicle referred to in subdivisions (1), (2), (3) of subsection 3 of this section shall not sound the siren thereon or have the front red lights on except when said vehicle is responding to any emergency call or when in pursuit of an actual or suspected law violator or when responding to, but not upon returning from a fire * * *.

(3) The exemptions herein granted to an emergency vehicle shall apply only when the driver of any such vehicle while in motion sounds audible signal by bell, siren, or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp displaying a red light visible under normal atmospheric conditions from a distance of five hundred feet to the front end of such vehicle."

From Paragraph 3, Subparagraph 3, Section 304.022, supra, it appears that an "emergency vehicle" is one of the types of vehicles mentioned in the section, including any privately owned "wrecker" or "tow truck", while performing emergency service. However, the section does not define "wrecker" or "tow truck", and of necessity

Honorable Albert F. Turner

we are required to look elsewhere for a suitable definition of these terms. We do not find any statute or court decision of Missouri defining either of said terms.

The only definition of the terms referred to above we have been able to find is in Webster's Third International Dictionary, and which reads as follows:

"Wrecker (3) an automotive vehicle with hoisting apparatus and mechanical equipment for towing wrecker or disabled automobiles, freeing automobiles stalled in snow or mud, or making minor repairs or adjustments at the roadside -- called also tow-car".

The above quoted definition does not ascribe any unusual or technical meaning to the words "wrecker" or "tow car" and defines them in such plain or ordinary language that any normal person of average intelligence will have no difficulty in grasping their meaning.

There is no indication the lawmakers intended to give the terms "wrecker" or "tow truck" as used in Section 304.022, (subparagraph 3, supra.) any unusual or technical meaning, so under provisions of Section 1.090, RSMo. 1959, on construction of statutes requiring words or phrases to be construed in their usual or ordinary sense unless they were intended to be used in a technical sense, said terms are to be construed and understood in their plain or ordinary sense. Since the definition from Webster's quoted above, appears to define the terms therein in plain or ordinary language and without technicalities, it is believed said definition is applicable to the terms "wrecker" and "tow truck" used in Section 304.022 supra.

It will be recalled that Webster's definition of "wrecker" or "tow car" which we have said is applicable to the type of emergency vehicle referred to in Section 304.022 supra., that a "wrecker" or "tow car" is equipped with hoisting apparatus and mechanical equipment for towing wrecked or disabled automobiles.

The pickup truck referred to in the opinion request appears to have only standard equipment such as is placed upon every pickup truck of that particular make and size by the manufacturer. It further appears that the truck has no boom, no tow bar and no air-compressor tank in the bed, and has only a wide wooden bumper for pushing cars.

It also appears the pickup truck, although the words "tow truck" are painted on the side, has none of the hoisting or mechanical equipment to enable its operator to use it to tow stalled or

Honorable Albert F. Turner

disabled automobiles, and it is readily seen that such truck is not a "wrecker" or "tow car" as defined by Webster, and that it is not a "wrecker" or "tow truck" within the meaning of Section 304.022, Paragraph 3, Subparagraph 3, RSMo. 1959.

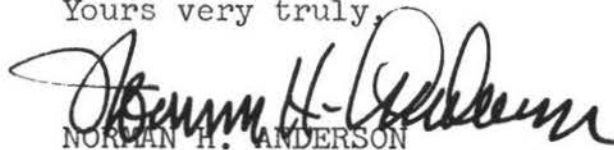
We are enclosing Opinion No. 290 written under date of May 5, 1966, to Edmund I. Hockaday concerning flashing lights.

CONCLUSION

Therefore, it is the opinion of this office that a privately owned pickup truck, used in responding to calls for emergency service by motorists of stalled or disabled vehicles, which truck has only standard equipment put on at the factory, without equipment for hoisting or towing stalled or disabled vehicles at road-side, is not a "wrecker" or "tow truck" within the meaning of Section 304.022, Paragraph 3, Subparagraph 3, RSMo. 1959.

This opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion No. 290
Hockaday
5/5/66

CRIMINAL LAW:
DEPARTMENT OF CORRECTIONS:
SUPREME COURT RULES:
PRISONERS:
SHERIFFS:

It is the duty of the penitentiary officials to transport a prisoner in their legal custody to and from a hearing in Circuit Court ordered under Supreme Court Rule 27.26. There is no authority for a county

to pay a sheriff mileage for transporting the prisoners in this situation.

OPINION NO. 155-68

August 22, 1968



Honorable Haskell Holman
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Holman:

This is in response to your opinion request dated 10 January 1968, as follows:

"I am enclosing copy of a letter from Judge William H. Billings and I will appreciate your advising me if the rulings as contained in opinions #15-56, dated March 23, 1956 (sic) and #2-57, dated June 12, 1957, issued to Honorable James D. Carter and Honorable Sam Appleby, respectively are applicable to question #1 of the enclosed letter and that the sheriff would not be entitled to mileage and expense for this service."

The enclosed letter you refer to reads in part as follows:

"Inmates of the Missouri Penitentiary who were sentenced by this court are filing Motions to Vacate their sentences under Supreme Court Rule 27.26. This often necessitates a hearing here in Kennett and when this happens, the inmate has to be brought from Jefferson City to Kennett pursuant to an order of this court. The warden has specifically asked that I frame my order so that he will deliver the prisoner to our sheriff at the main gate at the penitentiary and our sheriff will then bring

Honorable Haskell Holman

the prisoner to Kennett for the hearing and thereafter return him to Jefferson City.

"My question concerning the foregoing is as follows:

"Will the sheriff be allowed to charge Dunklin County for his mileage and expense in bringing the prisoner to the hearing and returning him to Jefferson City?"

Opinion 15-56 is not applicable to your inquiry as it refers to detainers and prisoner transportation, not Supreme Court Rule 27.26 hearings.

However, attached hereto is an official opinion rendered 19 November 1954, to G. Derk Green, Twelfth Judicial Circuit Judge, which holds that under the provisions of Section 476.470, RSMo 1959, all courts have an inherent right to issue writs necessary in the exercise of their jurisdiction.

Therefore, it is obvious that no matter what the writ be titled, a circuit judge may issue a writ requiring that the prisoner be produced for hearing.

Thus, it is our view that the proper order of the circuit judge in this case is to issue a writ to the Department of Corrections which Department holds the prisoner in custody, instructing the Department of Corrections to deliver the prisoner to the circuit courthouse for a hearing under Rule 27.26 and to return such prisoner at the conclusion of the hearing.

We find no authority for the circuit judge or the penitentiary officials to require the sheriff to transport the prisoner from the penitentiary and back to the penitentiary or to authorize payment to the sheriff if he does transport such prisoner without authority of law.

It is the duty of the penitentiary officials to comply with the writ and see that the prisoner is taken to the hearing and return him to the penitentiary at its conclusion. This principle is set out in the Opinion No. 2 of 1957 referred to above where it is held that a writ for the production of prisoners who are to be witnesses is directed to the authorities having custody of the prisoner and that it is their duty to produce him at the proper place in response thereto.


Honorable Haskell Holman

CONCLUSION

It is the duty of the penitentiary officials to transport a prisoner in their legal custody to and from a hearing in Circuit Court ordered under Supreme Court Rule 27.26. There is no authority for a county to pay a sheriff mileage for transporting the prisoners in this situation.

The foregoing opinion, which I hereby approve, was prepared by my assistant Howard L. McFadden.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion to Green
Dated 11/19/54

February 26, 1968

Opinion No. 158
Answered by Letter -
Duff

Honorable Will W. Davis
Director
Missouri Tourism Commission
308 E. High
Jefferson City, Missouri 65101



Dear Mr. Davis:

This letter is in response to the following question:

"Is the proposed plan of joint advertising
by Pepsi Cola and the State Tourism Commis-
sion constitutional?"

The plan in question proposes that the state spend approx-
imately \$34,000 to pay part of the cost of the media used.

We consider this advertising campaign to be spending public
money on a private corporation. This money would help advertise
Pepsi Cola. The State Legislature, and therefore all State agen-
cies, is without authority to grant or spend public money to aid
a private individual or corporation except in specified circum-
stances.

Section 38a, Article III, Constitution of Missouri, 1945,
states as follows:

"The general assembly shall have no power
to grant public money or property, or lend
or authorize the lending of public credit,
to any private person, association or cor-
poration, excepting aid in public calamity,
and general laws providing for pensions
for the blind, for old age assistance, for
aid to dependent or crippled children or
the blind, for direct relief, for adjusted

Will W. Davis

compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Section 39, Article III, Constitution of Missouri, 1945, states:

"The general assembly shall not have power:

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation; * * *."

Therefore, we hold that the State is forbidden by its constitution to spend public money in an advertising campaign that would help advertise Pepsi Cola.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

DD:lch

SCHOOLS:
SCHOOL DISTRICTS:
COUNTY BOARD OF EDUCATION:

Resident of Andrew County who lives in a school district of Nodaway County having territory located in Andrew and Holt Counties, if he meets all other statutory qualifications, is eligible for and qualified to serve, if elected, as a member of the board of education of Andrew County.

OPINION NO. 160 - 1968

September 3, 1968

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri



Dear Mr. Lance:

This is in response to your request for an opinion dated January 8, 1968, which reads as follows:

"This question concerns the County Board of Education in Andrew County, which is a county of the third class. The County Board of Education consists of six members, three of whom reside in one County Court District, and three of whom reside in the second County Court District. One of the County Board Members resides in, owns property in, and paid school taxes in a school district, part of which was, at the annual election in 1967 and by Board of Arbitration action subsequent thereto, transferred to a school district lying in the two adjacent counties of Holt and Nodaway. This school board member's taxes for the year 1967 went to the school district lying in the two adjacent counties.

"My question is: Is this County Board Member of the County Board of Education of Andrew County, who is now a resident of and a taxpayer in a school district located in Nodaway County but having territory located in Andrew and Holt Counties, eligible to remain as a member of the Andrew County Board of Education? Although he is still a resident of Andrew County, it would appear that, by virtue of the aforestated facts, his school loyalties would no longer be in Andrew County but would be in the school district of an adjoining county. The section of law involved would appear to be 162.111 RSMo., 1959, As Amended."

Section 162.111 RSMo Supp., 1967, provides for a county board of education in second, third and fourth class counties and also sets the qualifications of the members and the procedure for election and reads as follows:

"1. There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the State of Missouri; a resident householder and voter of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts.

"2. At the annual school election next following October 13, 1963, six members shall be elected whose terms shall be determined at the first meeting of the board subsequent to the election as follows: In each county court district the member receiving the highest number of votes shall serve for three years; the member receiving the next highest number of votes shall serve for two years, and the member receiving the least number of votes shall serve for one year. Thereafter each member shall serve for three years. Not more than three members shall be elected from one county court district.

"3. The cost of the election shall be charged to each component district of the county in the proportion that its assessed valuation bears to the assessed valuation of the entire county and shall be paid from the incidental fund."

Section 162.111 spells out the qualifications very clearly in that each member shall be (a) a citizen of the United States and of the State of Missouri, (b) a resident householder, (c) a voter of the county, and (d) not less than twenty-four years of age. The only other restriction is that there shall be no more than three members from one county court district.

This office has ruled that one who resides in a school district but outside the county to which the district has been designated to belong, is not qualified or eligible for election as a member of the county board of education of that county to which said district belongs because such individual in order to be a member of the county board of education must be a "resident householder of the county."

Honorable Alden S. Lance

We are enclosing official opinion No. 415, rendered to Honorable Richard M. Webster under date of December 24, 1963, which makes such holding.


It is provided in Section 162.181 RSMo Supp., 1967, that when a plan of reorganization includes any district with territory in more than one county, the state board of education shall designate the county containing that portion of the proposed district which has the highest assessed valuation as the county to which the district belongs. It appears that the legislature intended that the county board of education to which such district was assigned would be the board with regard to the entire district. However, it does not follow that this disqualifies one who is a resident of the fractional portion of the district that lies in the second county from serving on the county board of education of the second county. The members of the legislature chose not to add a requirement that a candidate for the county school board reside in a school district of the county of his residence. Had they done so, they would have disqualified some persons from serving on any county board of education.

CONCLUSION

It is the opinion of this office that a resident of Andrew County who lives in a school district of Nodaway County having territory in Andrew and Holt Counties, if he meets all other statutory qualifications, is eligible for and qualified to serve, if elected, as a member of the county board of education of Andrew County.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Robert K. Spalding.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Encl:

FIRE PROTECTION DISTRICTS:
CLASS ONE COUNTIES:
PENSIONS:

Fire protection districts may pension firemen on vote of people.
Section 67.200, RSMo Supp. 1967,
has no application to Section 321.220,
RSMo Supp. 1967.

OPINION NO. 163

March 26, 1968

Honorable A. Clifford Jones
State Senator
Seventh District, Ladue
9 Clermont Lane
Clayton, Missouri 63105



Dear Senator Jones:

In your letter of January 10, 1968, you requested an opinion from this office as follows:

"1. Was the 1965 amendment of Section 321.220, R. S. Mo. 1959 void when enacted as being in violation of Article VI, Section 25 of the Constitution as it existed at that time?

"2. Did the subsequent amendment of Article VI, Section 25 of the Constitution in 1966 give any validity to Section 321.220 as amended in 1965 if it was void when enacted?

"3. Was the 1965 amendment of Section 321.240, R.S.Mo. void as to its provision for a pension tax, as being in violation of Article VI, Section 25 of the Constitution as it existed at that time?

"4. Did the subsequent amendment of Article VI, Section 25 of the Constitution in 1966 give any validity to Section 321.240 as amended in 1965 if it was void when enacted?

"5. Does the term 'proper legislative action' as used in Section 67.200, R. S. Mo. 1967 mean that the legislative body of a political subdivision having more than forty million dollars assessed valuation may provide for the pensioning

Honorable A. Clifford Jones

of its officers and employees and their widows and orphans without a vote of the people?

"6. Does Section 67.200, R. S. Mo. 1967 apply to fire districts having an assessed valuation in excess of forty million dollars, whether or not the 1965 amendment of Section 321.220, R. S. Mo. 1959 is held to be valid?

"7. If section 67.200, R. S. Mo. 1967 does apply to fire districts with an assessed valuation of forty million dollars or more could such a fire district finance a pension plan adopted under this section, in accordance with the provisions of Section 321.240, R. S. Mo. 1959, as amended in 1965, if the latter amendment is valid?"

We are enclosing herewith an opinion issued by this office on September 27, 1962, to the Honorable E. J. Cantrell, State Representative, St. Louis County, Missouri, to the effect that the legislature has the constitutional authority to enact subdivision 15 of Section 321.220, RSMo Supp. 1967, authorizing fire protection districts to provide a pension for salaried members of its fire department. Since this opinion was issued, Section 321.220 has been amended so as to permit a special tax to be levied for this purpose. We approve of the holding in this opinion regarding the constitutionality of Section 321.220, subdivision 15.

We believe this opinion answers the first four questions that you have submitted.

In the fifth, sixth and seventh questions you submit, you inquire whether the term "proper legislative action" as used in Section 67.200, RSMo 1967, means that the legislative body of a political subdivision with an assessed valuation of \$40,000,000 or more may provide for pensioning of its officers and employees without a vote of the people and whether this statute has any application to fire protection districts organized under Chapter 321, RSMo 1959, as it applies to first class counties.

Section 67.200, RSMo Supp. 1967, provides:

"1. Any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, except counties of the second class having a population in excess of sixty-five thousand which adjoins a county of the first class with a charter form of government, which does not now have a pension system for

Honorable A. Clifford Jones

its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees and the widows and minor children of deceased officers and employees and to appropriate and utilize its revenues and other available funds for such purposes.

"2. In adopting a pension plan such counties, other political corporations or political subdivisions may provide for different benefits and requirements for elected officers and appointed officers and employees. Laws 1967, p. _____, S.B.Nos. 14 and 30, §1. "

This is a general statute which applies to every political corporation or subdivision of this state having an assessed valuation of forty million dollars or more except certain counties mentioned therein and provides that by "proper legislative action" the governing body of such political corporations or subdivisions may provide a pension for its officers and employees. It includes all employees and is not limited to salaried employees of the fire department of a fire protection district.

It is our view that the governing body of a political corporation or subdivision of this state as defined in Section 67.200 may provide for a pension to its employees without a vote of the people.

Section 321.220 (15), RSMo Supp. 1967, provides that a fire protection district is class one counties may provide for the pensioning of the salaried members of its organized fire department if approved by a majority of the qualified voters of the district as provided herein.

It is our view that Section 67.200, supra, has no application to pensioning of the salaried members of the organized fire department of a district organized under Section 321.220, RSMo Supp. 1967, because Section 67.200 is a general statute covering all employees of various political corporations and subdivisions while Section 321.220 is a special statute which applies only to salaried members of the fire department of a fire protection district. If a special provision of a statute applicable to a particular object is inconsistent with a general law, the special provision will prevail. State ex rel Monier vs. Crawford, 303 Mo. 652, 262 S.W. 341. This is true without regard to which statute was enacted first. State ex rel Equality Savings & Building Association v. Brown, 335 Mo. 781, 68 S.W.2d 55, followed in State ex rel Webster Groves Loan & Building Association, 334 Mo. 789, 68 S.W.2d 60.

Honorable A. Clifford Jones

It is the opinion of this office that the provision of Section 67.200, supra, does not apply to pensioning of salaried members of the organized fire department of a district organized under Chapter 321, RSMo, in first class counties.

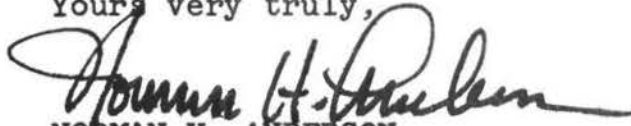
CONCLUSION

It is the opinion of this office that:

- (1) Section 321.220, RSMo Supp. 1967, is constitutional.
- (2) A fire protection district in class one counties may provide for pensions for the salaried members of its organized fire department if approved by a majority of the voters in the district.
- (3) Section 67.200, supra, has no application to the pensioning of salaried members of the organized fire department of a fire protection district organized in a class one county under Chapter 321, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosure - Opinion No. 329
Cantrell - 9/27/62

INSURANCE: The National Senior Citizens Benevolent
BENEVOLENT ASSOCIATIONS: Association is engaging in the business
of insurance in the State of Missouri.
The Articles of Agreement and the Con-
tributing Death Benefit Certificate clearly show that the purpose
of this association is to provide insurance for its members in
fact, if not in name.

OPINION NO. 164

March 12, 1968

Honorable Robert D. Scharz
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Scharz:

Reference is made to your letter of January 12, 1968, in
which you said:

"This office has under investigation the
National Senior Citizens Benevolent Associa-
tion, a corporation which we believe to be
engaging in the transaction of insurance
business without authorization of this
Department as provided for in our insurance
code.

We enclose herewith copy of the Decree of
Pro Forma Corporation and copy of the Con-
tributing Death Benefit Plan of this corpora-
tion. These documents set out in detail the
plan of operation of this association.

We request herewith your opinion as to whether
this corporation is engaging in the business
of insurance within the State of Missouri as
such business is defined by our courts and
statutes."

The Fourth Article of the Articles of Agreement of the fore-
going association contains the following provisions which are par-
ticularly relevant to our question:

Honorable Robert D. Scharz

"Fourth: This association is formed for the purpose of providing, at small cost, for persons who shall become members of said association, a death benefit plan to be supported by voluntary contributions and memberships from such members and others, if possible, whereby such donations shall pay benefits when a member of such association shall die by sickness or accident.

* * * * *

Membership requirements in the association shall consist of the following:

- (a) Members shall be 50 years of age or older.
- (b) Members shall be benevolent in thought and deed.
- (c) Members shall be charitable in thought and deed.
- (d) Members shall be willing to aid a fellow member who may be ill or in distress.

Dues in said association shall be Ninety Dollars (\$90.00) for initial membership and Fifty Dollars (\$50.00) for yearly renewal of membership. In event of cancellation of the said death benefit plan, the member of the association will be notified of such cancellation. Decisions for cancellation shall be by a majority vote of the Board of Directors, and its decision shall be final. The Board of Directors of said association shall be the applicants herein.

The said death benefit plan shall be based on donations of members of said association to other members of said association who are in need; members shall be formed into groups up to a total of one thousand two hundred fifty (1,250) members, the members of which will agree to help and contribute to one another in event a member has died by accident or sickness. (Emphasis ours)

Honorable Robert D. Scharz

Each of said groups of members will consist of persons who agree individually and not jointly to donate within thirty (30) days after notifications that a member has died by sickness or accident a sum not to exceed One Dollar (\$1.00) for each member of his or her group who dies as a result of sickness or accident.

* * * * *

The operation of said plan shall be: When a member dies the beneficiary shall notify the National Senior Citizens Benevolent Association and send to the association Proof of Death form furnished at the request of the member's beneficiary and upon receipt of such Proof of Death form, the association may review the validity of the claim, and, if satisfied that such claim is legitimate and lawful, will notify other members of the group that such member's beneficiary is in need of a donation. Upon receipt of other member's donations the association shall then pay to claimant member's beneficiary such donations received, but not to exceed the maximum sum of One Thousand Dollars (\$1,000.00).

The members of the plan shall be told and given to understand that the association is not an insurance company, but is a benevolent association formed for helping fellow members at the time of the member's death, and at such time, member's beneficiary shall receive only what fellow members of the group shall donate."

The Contributing Death Benefit Plan Certificate outlines the program of death benefit protection which the association seeks to provide. It is our understanding that this certificate is signed by those who wish to become members of the group and thereby constitutes the formal agreement between the member and the association. The following are relevant excerpts from the Death Benefit Plan:

Honorable Robert D. Scharz

"Since the plan is based on the donation of the members to members in need, the Association is formed into groups who will help and contribute to one another in the event of death. However, each group of members will consist of persons who agree individually and not jointly to make a donation within thirty (30) days after notification, not to exceed One Dollar (\$1.00) for each member of their group, that dies or is killed by accident. For example, if a member of one of the groups dies or is killed in an accident, then each member of the group donates money to pay the necessary funeral expenses up to but not to exceed \$1,000.00. (Emphasis ours)

* * * * *

When a member dies or is killed by either sickness or accident the beneficiary will notify the NSCBA and send to the Association a certificate of death.

The NSCBA upon receipt of the member's proof of loss check on the validity of the claim and if satisfied that the claim is a legitimate one will then notify the other members of the group that a member is in need of a donation.

The Association upon receipt of fellow members donations will pay to the claimant member the donations received not to exceed \$1,000.

It is not the purpose of the Association to mislead or misinform its members so the following information is set out in large type:

DONATIONS WILL BE ASKED JUST FOR THE ACTUAL COST OF ALL NECESSARY EXPENSES. IN NO CASE WILL A MEMBER BE PAID MORE THAN ACTUAL CHARGES, NOT TO EXCEED ONE THOUSAND DOLLARS.

* * * * *

Honorable Robert D. Scharz

In the event of cancellation of the death benefit plan the member will be so notified and the decision of the Board of Directors is final.

I solicit the National Senior Citizens Benevolent Association to join their death benefit plan. I understand and agree that the National Senior Citizens Benevolent Association is not an INSURANCE COMPANY.

I UNDERSTAND I WILL RECEIVE ONLY THAT MONEY WHICH IS DONATED FOR ME, NOT TO EXCEED \$1,000."

Missouri's statutes do not define the term "insurance". In State ex rel. Inter-Insurance Auxiliary Company vs. Revelle, 257 Mo. 529, l.c. 535, 165 S.W. 1084, the essential elements of a contract of insurance are alluded to in the following language:

"The essential elements of a contract of insurance are an agreement, oral or written, whereby for a legal consideration the promisor undertakes to indemnify the promisee if he shall suffer a specified loss."

In the case of Rogers vs. Shawnee Fire Insurance Company of Topeka, Kansas, 132 Mo. App. 275, l.c. 278, 111 S.W. 592, the Kansas City Court of Appeals used the following language in discussing the words "indemnity" and "insurance":

" * * * Indemnity signifies to reimburse, to make good and to compensate for loss or injury. [4 Words and Phrases, p. 3539.] Insurance is defined by Bouvier, 'to be a contract by which one of the parties, called the insurer, binds himself to the other called the insured, to pay to him a sum of money, or otherwise indemnify him.'"

In Richards On Insurance, Fifth Edition, Volume 1, Section 4, p. 11, we find the following:

"Where statutory definition is lacking, what constitutes 'insurance' is left to judicial decision and temperament."

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At 44 C.J.S., Insurance, Sec. 59, p. 528, we consider the following language appropriate as an introduction to our problem:

" * * * Whether a company is engaged in the insurance business depends, not on the name of the company, but on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of the business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. In determining whether a business is an insurance business, the nature of the contract or forms in which the parties state their relations must be considered, and whether a contract is one of insurance is determined by its purpose, effect, contents and import, and not merely from its terminology, although it does not, on its face purport to be one of insurance, and even though it contains declarations to the contrary."

The following admonitions are not to be overlooked when considering whether an association is unlawfully engaged in the insurance business, and are found at 44 C.J.S., Insurance, Section 70, p. 549:

"The prohibition against engaging in the business of insurance without the prescribed authority is held to be absolute. In determining whether or not an association is engaged in the business of insurance in violation of the law, the court is concerned with the plan as a whole and not with artificially segregated single phases of the plan. * * *"

Section 377.010, RSMo 1959, reads as follows:

"Every contract whereby a benefit is to accrue to a person or persons named therein, upon the death or physical disability of a person also named therein, the payment of

Honorable Robert D. Scharz

which said benefit is in any manner or degree dependent upon the collection of an assessment upon persons holding similar contracts, shall be deemed a contract of insurance upon the assessment plan, and the business involving the issuance of such contracts shall be carried on in this state only by duly organized corporations which shall be subject to the provisions and requirements of sections 377.010 to 377.190."

The principles of law outlined above were taken from a former opinion of this office, Attorney General's Opinion No. 50, Scharz, 8/22/67. That opinion was written in response to a set of facts very similar to those involved in the present case. It was held in that opinion that a benevolent association was engaging in the business of insurance where it maintained a program for the recovery of medical and hospital expenses through voluntary contributions of its members.

The National Senior Citizens Benevolent Association has a death benefit plan providing for payment up to \$1,000 to the beneficiary of any member who dies from sickness or accident. Each member is expected to pay \$1.00 for each benefit claim. Although there are no specific penalties provided for those who do not contribute, the Board of Directors may cancel the death benefit plan of any member by a simple majority vote. The death benefit plan certificate states that it is not an insurance company and all contributions are supposed to be voluntary. However, the members do agree in the death benefit certificate, which they must sign, that they will make donations when one of their number dies. The whole purpose of the arrangement is to have the surviving members indemnify the beneficiaries of a deceased member. While members may not be legally compelled to donate, the plan certainly operates on the assumption that they will donate. The plan contains the elements of an insurance contract. Each member agrees that he will contribute in order to indemnify the beneficiaries of a deceased member.

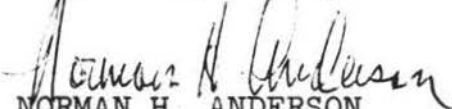
CONCLUSION

The National Senior Citizens Benevolent Association is engaging in the business of insurance in the State of Missouri. The Articles of Agreement and the Contributing Death Benefit Plan Certificate clearly show that the purpose of this association is to provide insurance for its members in fact, if not in name.

Honorable Robert D. Scharz

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

OPINION NO. 165
Answered by Letter--Sprick

March 14, 1968

Honorable Robert D. Scharz
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Scharz:

This is in response to your letter of January 12, 1968, providing this office with copies of the Articles of Agreement and Accident and Sickness Plan of the American Senior Citizens Benevolent Association and asking for an opinion as to whether that association is engaging in the business of insurance in the State of Missouri.

The purpose of the association is to form a group of members who agree to contribute to one another in the event of an accident or sickness. Voluntary donations are to be taken from all the members to help cover medical and hospital expenses of a member that becomes injured or sick. Donations are asked for the actual cost of each sickness or accident up to One Thousand Dollars.

The question which is raised by these facts has previously been considered at length by this office. Opinion No. 50, 8/22/67, Scharz; Opinion No. 164, 3/12/68, Scharz. Those opinions concluded that a benevolent association is engaged in the business of insurance where it institutes death benefit plans which are designed to indemnify the beneficiaries of deceased members, and, where it sets up disability, sickness and accident plans to help defray medical and hospital expenses of a member. Both of those opinions were written in regard to benevolent associations who stated that they were not insurance companies and purported to operate entirely on voluntary contributions. However, as those opinions pointed out, the essential elements of an insurance contract were present when the plans were closely examined. It was evident that the effect of the plans was to present insurance coverage for their members. The American Senior Citizens Benevolent Association's Accident and Sickness Plan is also purportedly based on voluntary donations and expressly disclaims being an insurance company.

Honorable Robert D. Scharz

We believe that the legal reasoning used in the opinions which we have cited is controlling in answer to the instant request. Therefore, it is the opinion of this office that the American Senior Citizens Benevolent Association is engaged in the business of insurance in the State of Missouri under its plan to provide accident and sickness protection to its members through voluntary contributions.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

GGS/jlf

Enc.--Op. No. 50; 8/22/67; Scharz
Op. No. 164; 3/12/68; Scharz

SHOPLIFTING: Private citizen may arrest without warrant for
CRIMINAL LAW: felony or petty larceny committed in his presence.
ARREST:
CITIZENS ARREST:
WARRANTS:

January 23, 1968



Honorable Richard Snider
Assistant Prosecuting Attorney
Cape Girardeau County Court House
Cape Girardeau, Missouri 63701

Dear Mr. Snider:

You ask if there is any way you can give non-residents the power of arrest for shoplifting.

You cite research indicating that non-residents may not be made Deputy Peace Officers.

It is not necessary that all arrests be made by Peace Officers.

In the case of State v. Parker 378 SW2d 274, the Court commented concerning arrests by private citizens for certain crimes committed in their presence.

The Court said, 1.c. 282:

"* * * The private citizen is limited in the power of arrest; but he does have the right, without warrant or other process, to arrest for certain crimes, such as the commission of a felony or the commission of petit larceny in the presence. But he should be sure both of the crime and of the person. Pandjiris v. Hartman, 196 Mo. 539, 94 S.W. 270; Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S.W. 681; see State v. Parker, 355 Mo. 916, 199 S.W.2d 338, 340. * * *"

Very truly yours,

NORMAN H. ANDERSON
Attorney General

AGRICULTURE:
OLEOMARGARINE:
STATUTORY CONSTRUCTION:

Oleomargarine made and manufactured from the ingredients, commodities or combinations thereof, named and set forth in Section 561.770, RSMo 1959, may be sold or offered for sale only when the containers or cartons thereof have printed thereon the word "oleomargarine".

OPINION NO. 169

March 26, 1968

Honorable Nelson B. Tinnin⁴
State Senator- 23rd District
Hornersville, Missouri



Dear Senator Tinnin:

This is in reply to your recent letter requesting an opinion of this office and reading in part as follows:

"This is to request an opinion as to whether the state margarine law permits the use of the term 'margarine' for the product. It is historically, commonly, and also federally used as being synonymous with 'oleomargarine', a word used by the legislature in writing the law years ago. * * *"

The provisions of the law to be considered with respect to your request are paragraphs one and three of Section 561.770, RSMo 1959, which read as follows:

"1. That for the purposes of this section certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil,

Honorable Nelson B. Tinnin

vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat-- if made in imitation or semblance of butter or calculated or intended to be sold as butter or for butter or churned, emulsified or mixed in cream, milk, water, or other liquid and containing moisture in excess of one per cent.

* * * * *

3. Oleomargarine made and manufactured from the ingredients, commodities or combinations thereof herein named and set forth shall be sold or offered for sale only when the containers or cartons thereof have printed thereon the word 'oleomargarine'."

Your question is whether the substance defined as oleomargarine in paragraph 1 of Section 561.770 may be sold in containers or cartons having the word "margarine" imprinted thereon instead of the word "oleomargarine".

As indicated in your letter, many states and the Federal Government consider that the term margarine is synonymous with oleomargarine. In a Notice of Proposed Rule Making in the matter of amending the definition and standard of identity for oleomargarine published in the Federal Register October 13, 1951 [21 CFR Part 45], the Acting Administrator of the Food and Drug Administration made the following findings of fact:

"1. Since the definition and standard of identity for oleomargarine (21 CFR 45.0) was adopted in 1941, sections of the Internal Revenue Code dealing with oleomargarine have been repealed. The Food, Drug, and Cosmetic Act of 1938 has been amended to include special provisions with respect to colored oleomargarine (64 Stat. 20). In this legislation 'margarine' was made a synonym for 'oleomargarine' in provisions prescribing labels for oleomargarine. Prior to this time the term 'margarine' had been used extensively in the United States as a synonym for oleomargarine, but the Oleomargarine Act of August 2, 1886, as amended, provided that foods made in semblance of butter should be designated as oleomargarine. (R. 18-25, 31-35)"

Honorable Nelson B. Tinnin

The Legislature of Missouri has not been unmindful of the term margarine. Section 561.770 was enacted in 1929 and referred only to oleomargarine. However, in 1959 the legislature enacted Section 413.285 which specifically recognizes margarine as follows:

"That butter, oleomargarine, and margarine shall be offered and exposed for sale and sold by weight and only in units of one-fourth pound, one-half pound, one pound, or multiples of one pound avoirdupois weight."

Thus we have a situation where the legislature having defined the term "oleomargarine" in 1929, thereafter, in 1959, enacted further legislation on the same subject matter without amending the definition.

The fact that the legislature permitted the definition of oleomargarine to stand for many years without changing its phraseology, although enacting another statute on the same subject matter is persuasive evidence that the legislature intended that the scope of the latter enactment would be controlled by the definition. The applicable rule of statutory construction is stated in *Morgan v. Jewell Construction Co.*, 91 S.W. 2d, 638, 641, as follows:

"[3-5] It is well established that a construction of a statute by the Legislature, as indicated by the language of other or subsequent enactments, is entitled to consideration as an aid to interpreting a statute. 59 C.J. p. 1033; *State ex rel. v. Hackmann*, 275 Mo. 47, 54, 204 S.W. 513; *State ex inf. v. Long-Bell Lumber Co.*, 321 Mo. 461, 12 S.W. (2d) 64; *Evans v. McLalin*, 189 Mo. App. 310, 175 S.W. 294; *State ex rel v. Wilson*, supra; *Crohn v. Kansas City Home Telephone Co.*, 131 Mo. App. 313, 109 S.W. 1068. And where the controversy has arisen since the enactment of the subsequent statute or amendment wherein the Legislature has indicated that the statute should be taken to mean a certain thing, such legislative construction should be given great weight. * * *"

It appears, therefore, that to carry out the legislative intent, the substance which the legislature has defined as "oleomargarine" in Section 561.770 and referred to as "margarine" in Section 413.285, "shall be sold or offered for sale only when the

Honorable Nelson B. Tinnin

containers or cartons thereof have printed thereon the word 'oleomargarine'." These words of the statute are unambiguous and unequivocal. In such circumstances, as stated by the Court in *Clark vs. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 1.c. 44 and 46:

"(2) Courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the Legislature and unmistakably expressed in legislative words. 'Expressum facit cessare tacitum'. We must not interpret where there is no need of it. * * *

* * * * *

We think learned counsel has mistaken the source of the power to correct evils, if any, in the statute. He should go to the Legislature, and request that body to enlarge the remedy, and make it flexible and broad enough to include cases within the hardships put by him in the case at bar, and see what the lawmaker says; for it seems sensible that the lawmaker should first write the law, and not we. To us the maxim applies: 'Jus dicere et non jus dare.'"

The Supreme Court of the United States considered an unambiguous statute in *Iselin vs. United States*, 270 U.S. 245, 46 S. Ct. 248 (70 L.Ed. 566). It stated its conclusion as follows:

"* * *The statute was evidently drawn with care. Its language is plain and unambiguous. [251] What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare *United States v. Weitzel*, 246 U.S. 533, 543, 62 L.Ed. 872, 874, 38 Sup. Ct. Rep. 381; *Peoria & P.U.R. Co. v. United States*, 263 U.S. 528, 534, 535, 68 L. ed. 427, 430, 431, 44 Sup. Ct. Rep. 194. * * *"

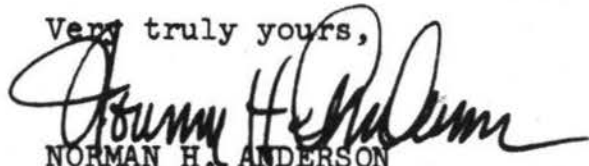
Honorable Nelson B. Tinnin

CONCLUSION

It is the opinion of this office that oleomargarine made and manufactured from the ingredients, commodities or combinations thereof, named and set forth in Section 561.770, RSMo 1959, may be sold or offered for sale only when the containers or cartons thereof have printed thereon the word "oleomargarine".

The foregoing opinion, which I hereby approve, was prepared by my assistant L. J. Gardner.

Very truly yours,

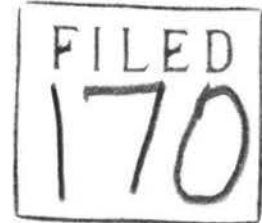


NORMAN H. ANDERSON
Attorney General

COUNTY COURT: In county of class three the county court may,
COUNTY CLERK: on recommendation of the county clerk, transfer
TRANSFER OF FUND: funds from the emergency fund to the road and
bridge fund, but only for unforeseen emergencies
and only on a unanimous vote of the county court.

OPINION NO. 170

May 14, 1968



Honorable Carl D. Gum
Prosecuting Attorney
Cass County Courthouse
Harrisonville, Missouri 64701

Dear Mr. Gum:

This opinion is written to respond to your inquiry whether the clerk of a county court, as budget officer, may transfer funds from the emergency fund to the road and bridge fund.

We assume that implicit in your inquiry, there is the question whether the county clerk as a budget officer may transfer such funds on his own initiative and at his discretion. Also, we assume that your inquiry is limited in its application to a county of the third class, since Cass County is of that class.

Section 50.540, RSMo Supp. 1967, which is the pertinent statute involved here, reads as follows:

"1. On or before September first of each year in counties of class one, and on or before December first in counties of class two, and on or before the fifteenth day of January in counties of classes three and four each department, office, institution, commission, or court of the county receiving its revenues in whole or in part from the county shall prepare and submit to the budget officer * * *"

"4. * * * At any time during the year the county court in counties of class one may make transfers from the emergency fund to any other appropriation, and in counties of classes two, three and four the county court may make these transfers on recommendation of the budget officer; but the transfers in all classes shall be made only for

Honorable Carl D. Gum -

unforeseen emergencies and only on unanimous
vote of the county court." (Emphasis added)

This statute thus provides that the county court may make these transfers on the recommendation of the budget officer. While the statutory use of the word "may" is permissive, it is our view that the legislative intent is the discretion rests with the county court, whether such transfer "may" be done. It is not a question in our opinion whether some other county officer or body may likewise have the authority to transfer the fund under the above statute. Thus, we consider the use of the word "may" in the statute above to indicate that the discretion to be exercised rests entirely within the ambit of the authority of the county court. Specifically, the county clerk as budget officer, may make recommendations to the county court, but it is the court that approves and directs the transfer of the funds from the emergency fund to the road and bridge fund.

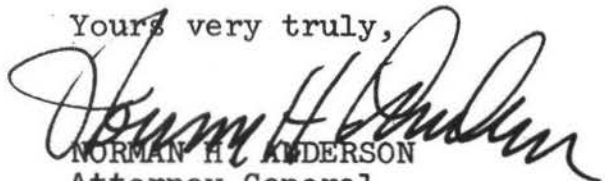
We predicate our opinion on a familiar legal maxim to the effect that where a statute enumerates the subjects or things on which it is to operate, or person effected, or forbids certain things, it is to be construed as excluding from its effect all things not expressly mentioned. See Brown v. Morris, 290 S.W.2d 160, 166. This responsibility for the exercise of discretion on the part of the county court may not be delegated or transferred. Thus, the county court cannot delegate its discretionary or legislative power and any delegation thereof would be void. City of Springfield v. Clouse, 206 S.W.2d 539, 545. We conclude that although the county clerk as the budget officer may make recommendations to the county court on the matter, the question of the transfer of funds rests solely in discretion of the county court.

CONCLUSION

It is the opinion of this office that:

In county of class three the county court may, on recommendation of the county clerk, transfer funds from the emergency fund to the road and bridge fund, but only for unforeseen emergencies and only on a unanimous vote of the county court.

Yours very truly,

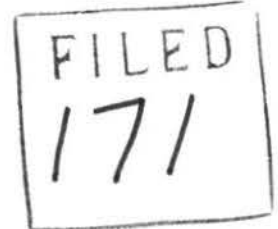

NORMAN H. ANDERSON
Attorney General

NINE HOUR LAW:
FEMALE EMPLOYEES-FEMALE LABOR:

Female employees of a business office of a construction company fall within the purview of Section 290.040, RSMo Supp. 1967, prohibiting certain establishments from employing female labor for a longer period than nine hours in one day or fifty-four hours in one week.

OPINION NO. 171

February 8, 1968



Mr. George W. Flexsenhar, Director
Division of Industrial Inspection
Department of Labor and Industrial
Relations
Broadway State Office Building
P. O. Box 449
Jefferson City, Missouri 65101

Dear Mr. Flexsenhar:

This is in response to your letter of January 15, 1968, requesting an opinion of this office regarding the question of whether a business office of a construction company is within the types of establishments prescribed in Section 290.040, RSMo Supp. 1967.

Section 290.040, RSMo Supp. 1967, reads as follows:

"1. Hours of labor of female employees. No female shall be employed, permitted, or suffered to work, manual or physical, in any manufacturing, mechanical, or mercantile establishment, or factory, workshop, laundry, bakery, restaurant, or any place of amusement, or to do any stenographic or clerical work of any character in any of the diverse kinds of establishments and places of industry, herein described, or by any person, firm or corporation engaged in any express or transportation or public utility business, or by any common carrier, or by any public institution, incorporated or unincorporated, in this state, more than nine hours during any one day, or more than fifty-four hours during any one week; * * *" (Emphasis ours)

Mr. George W. Flexsenhar

The wording of the statute clearly prohibits the employment of females in the enumerated types of businesses for a longer period than nine hours during any one day and more than fifty-four hours during any one week.

In order for the statutes to be applicable, a business office of a construction company must fall within one of the following types of establishments: manufacturing, mechanical or mercantile establishment, factory, workshop, express, transportation or public utility business, common carrier or public institution.

A well-settled rule of statutory construction is stated in State ex. inf. Conkling, ex rel. Hendricks v. Sweaney, 270 Mo. 685 loc. cit. 692. " * * * That the expression of one thing is the exclusion of another."

Before the employees of a business office of a construction company can be within the application of Section 290.040, RSMo Supp. 1967, they must be found within its terms.

A construction company is clearly not a "factory", "workshop" or "express, transportation, or public utility business". Neither is it a "common carrier" or "public institution". In order for Section 290.040, RSMo Supp. 1967, to be applicable, a construction company must be found to be a "manufacturing, mechanical or mercantile establishment".

Many Attorney General opinions have exempted a category of female employees for one reason or another. In past opinions, it was concluded that a nursery did not come within the definition of mercantile establishment merely because it sold produce; also this office concluded that female employees of a hotel did not fall within the purview of the nine-hour law because a hotel would not come within the meaning of factory, workshop, bakery, place of amusement, manufacturing or mercantile establishment.

Additional categories of employment construed to be outside the purview of Section 290.040 are employees in private nursing homes, nurses employed by manufacturing and mercantile establishments and female employees of state hospitals. At the same time, females employed in a restaurant, laundry or snack shop operated in connection with an educational institution were held to be within the "nine-hour" law.

It is a general rule that a state statute limiting the hours of employment should be liberally construed to effect its object to protect the health of employees and promote the general welfare; and an exception or exemption should be strictly construed. C.J.S., Master and Servant, § 15, p. 98.

Mr. George W. Flexsenhar

The terms "manufacturing, mechanical or mercantile establishments" when considered together constitute a broad category.

Lilley vs. Eberhardt, 37 S.W.2d 599, held that a paving company was a "manufacturing establishment" under a statute requiring safeguarding of machinery. The court stated that the term included any place where machinery is used for manufacturing purposes and that the highway with the portable machine shop constituted a manufacturing place.

In Henderson v. Heman Const. Co., 199 S.W. 1045, the court was again concerned with the interpretation of a highly remedial statute. The court held that the defendant, a company engaged in the construction of a viaduct at the intersection of Chouteau and Jefferson Avenue in St. Louis across the tracks of several railways, fell within the terms "manufacturing, mechanical or other establishments" in a statute requiring guards on machinery. The court said on page 1049:

"* * * This defendant was undoubtedly engaged in a branch of manufacturing or mechanical work and its appliances used were as much included within this law as if they had been housed and covered up and all under roof. It was engaged in a manufacturing and mechanical enterprise requiring the use of machinery. While its working plant was not under cover or in a building, its plant, as located and used, was 'established,' whether temporarily or permanently is immaterial, at a certain place to carry on certain work, in the doing of which machinery was used, and all the machinery so used was of the 'establishment'. That being so, it was within the law.* * * "

In Tatum v. Crescent Laundry Co., 201 Mo.App. 97, 208 S.W. 139, 142, the court was concerned with another remedial statute requiring guards on machinery in certain types of establishments. The court construed the terms "manufacturing, mechanical and other establishments" to include a laundry. In that case, "mechanical" was defined as "a term of very broad meaning and is defined by the Century dictionary as pertaining to mechanics or machinery. A mechanical establishment is broad enough. . .to cover almost any plant or place where machinery is set up and operated."

It should be noted that Section 290.040, was revised in 1913 to include "any stenographic and clerical work of any character in any of the divers kinds of establishments and places of industry herein described." Therefore, there can be no distinction between the operators of equipment in the establishment and the office employees.

Mr. George W. Flexsenhar

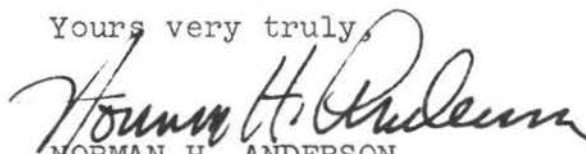
In light of the purpose of Section 290.040, RSMo Supp. 1967, in promoting the welfare of female employees working in certain types of establishments, and the broad language of that statute, it is the opinion of this office that female employees of a business office of a construction company fall within the purview of Section 290.040, RSMo Supp. 1967.

CONCLUSION

Therefore, the opinion of this department is that female employees of a business office of a construction company fall within the purview of Section 290.040, RSMo Supp. 1967, prohibiting certain establishments from employing female labor for a longer period than nine hours in one day or fifty-four hours in one week.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Steve Weber.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

ECONOMIC POISONS: Incidental differences such as differences
STATUTORY CONSTRUCTION: in size, shape or color of labels, or dif-
DEPARTMENT OF AGRICULTURE: ferences in trade names or advertising
 emblems on labels, does not preclude regis-
 tration of two or more economic poisons as
a single product under Section 263.300, RSMo 1959, of the Economic
Poisons Law when the writing on such labels is identical with respect
to showing that the products have the same formula, are manufactured
by the same person, the labeling of which contains the same claims and
identifies the products as the same agricultural chemical.

OPINION NO. 172

May 28, 1968



Mr. Lester H. Barrows
State Entomologist
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Barrows:

This is in response to your request for an opinion with respect to the Missouri Economic Poisons Law. Your request, in which you quote pertinent portions of Paragraph 1, Section 263.-300, RSMo 1959, is as follows:

"For an example, we are enclosing several sets of labels which the manufacturing companies have requested we register as one product, since the active ingredient is the same and they are manufactured by the same company. Now, what we need to know is whether the statement, 'Products which have the same formula and are manufactured by the same person, the labeling of which contains the same claims, and the labels which are identical with the exception of the trade name and which bear a designation identifying the product as the same agricultural chemical, may be registered as a **single product**', implies that these labels can be registered as one, or if the labels have to be identical in all ways, i.e. color, size of label, content of label, etc., except for the trade name."

Mr. Lester H. Barrows

The meaning of the phrase "the labels which are identical" is to be determined by the context and the apparent purposes of the statute in which it is used. It appears from the samples which you enclosed that a label is a piece of paper or other material affixed to the container of the product to indicate its origin, nature and contents. A label is intended to indicate the article contained in the bottle, package or box to which it is affixed. Higgins vs. Keuffil, 140 U.S. 428, 33 L.Ed. 470.

To effectuate the purpose of the statute, the word "identical" must be construed in a not too restrictive manner. As stated by the court in Boling vs. Buckeye Incubator Co., 33 F. 2d 347, 348: "Its proper construction might be expressed in the phrase 'without material change'" In Foxborough Co. vs. Taylor Industries Co., 157 F. 2d 226, 228, the court construed the word "identical" as used in a federal statute relating to claims that are identical with an original patent, as follows: "Although the amendment used the word identical, we read this as 'substantially identical'. . . ." In Bellows vs. Travelers Insurance Co., 203 S.W. 978, the Supreme Court of Missouri en banc stated:

"'Substance', as its etymology indicates, is that which stands under and supports all phenomena whether material or mental. It is the essence of the thing itself, and is that element of which the law takes notice in administering concrete justice. A proposition is substantially true when it is essentially true, and it is essentially true when it states the substance of the thing to which it refers. We know of no word that can better express the real and practical nature and effect of an act than the word 'substantially'. It indicates all that is substantial in the result.* * * *"

It follows, therefore, that when the writing on the labels shows that the products have the same formula and are manufactured by the same person, the labeling of which contains the same claims and bear a designation identifying the product as the same agricultural chemical, such labels are substantially identical within the context and purpose of the statute which prescribes their use, regardless of such incidental features as color, size or shape of the labels or advertising emblems placed on the labels.

CONCLUSION

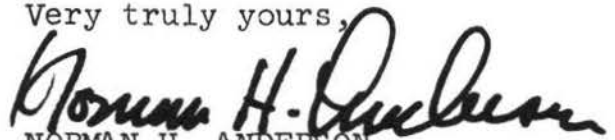
It is the opinion of this office that incidental differences such as differences in size, shape or color of labels, or differences in trade names or advertising emblems on labels, does not preclude registration of two or more economic poisons as a single product

Mr. Lester H. Barrows

under Section 263.300, RSMo 1959, of the Economic Poisons Law when the writing on such labels is identical with respect to showing that the products have the same formula, are manufactured by the same person, the labeling of which contains the same claims and identifies the products as the same agricultural chemical.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

SCHOOL DISTRICTS:
CHANGE OF BOUNDARY:
ST. CHARLES COUNTY:
EXTENDING SCHOOL BOUNDARY:
BOUNDARIES:

The extension of the municipal boundaries of the City of St. Charles does not automatically extend the boundaries of the St. Charles School District under Section 162.421, RSMo. Supp. 1967, where the territory taken in by the extension

of the city is contained within a six-director school district that maintains a high school. The inhabitants of the area annexed by the City of St. Charles may not change the boundaries of the school district by election under Subsection 2 of Section 162.421, RSMo. Supp. 1967. However, the voters of the two school districts may change the boundaries between the school districts under the general change-of-boundary statute, Section 162.431, RSMo. Supp. 1967.

Opinion No. 173

July 16, 1968

Honorable Andrew H. McColloch
Prosecuting Attorney
St. Charles County
First National Bank Building
St. Charles, Missouri



Dear Mr. McColloch:

This official opinion is rendered upon your request for a ruling interpreting Section 162.421, RSMo. Supp. 1967.

Your letter of request outlines the following relevant facts: (1) The City of St. Charles proposes to annex an area which is presently within the R-5 School District of St. Charles County. (2) Both the school district of St. Charles and the R-5 School District are wholly within the boundary of St. Charles County, a county of the second class. (3) There are no cities with a population of more than 75,000 in St. Charles County. (4) The R-5 School District maintains a high school.

You pose two questions which are as follows:

"1. If the proposed annexation of the City of St. Charles is successful in that area presently included in the R-5 School District, will the boundaries of the St. Charles School District be automatically extended into that same area?

"2. In the event that your opinion is that the extension of the boundary is not

Honorable Andrew H. McColloch

automatic upon annexation, may the inhabitants of the annexed area hold a special election to affect such an extension?"

I.

Regarding your first inquiry:

We are of the opinion that a proposed annexation is within one of the exceptions to the provisions of Section 162.421.

Subsection 1 of Section 162.421, RSMo. Supp. 1967 states as follows:

"Except districts containing a city or a part of a city having more than seventy-five thousand inhabitants and districts in counties of the first class, the extension of the limits of any city or town beyond the boundaries of a six-director school district in which it is included shall automatically extend the boundaries of that district to the same extent, effective on the first day of July next following the extension of the limits of the city or town, and except in counties of the second class if the extension of the limits of the city or town includes territory contained in another six-director school district which maintains a high school, then the school district boundary lines shall not be enlarged to include territory in said six-director district by reason of the extension of the city or town limits."

This statute provides for the automatic extension of six-director school district boundaries where the boundaries of the city or town in which the school district lies are extended. There are three exceptions to the automatic extension: (1) where the city has more than 75,000 inhabitants, (2) where the district is in a county of the first class, and (3) in certain instances in second class counties.

Since there are no cities of more than 75,000 involved and since St. Charles is not a county of the first class, we turn to consideration of the third exception. St. Charles is a county of the second class.

The third exception applies under the following conditions: (1) The districts are within a county of the second class. (2) The extension of the city or town includes territory contained in another six-director school district. (3) That district maintains a high school.

Honorable Andrew H. McColloch

From the information you have provided us: (1) The school districts involved are within a county of the second class. (2) The proposed extension of the city includes territory contained in a six-director school district. (3) That six-director school district maintains a high school.

Therefore, we are of the opinion that the proposed annexation extending the boundaries of the City of St. Charles will not automatically extend the boundaries of the St. Charles School District.

II.

As to your second inquiry:

Subsection 2 of Section 162.421, RSMo. Supp. 1967 provides as follows:

"Whenever, by reason of the extension of the limits of any city or town, a portion of the territory of any school district adjacent thereto is incorporated in a six-director district, the inhabitants of the remaining parts of the district have the right to be annexed to the six-director district. When such part of a school district desires to be so annexed, a special election or an election at a special meeting shall be held as provided in Section 162.441, and if a majority of the votes cast favor annexation, the secretary shall certify the fact, with a copy of the record, to the board of the district and to the board of the six-director school district; whereupon the board of the six-director district shall meet and confirm the annexation by a proper resolution of record. When such part of a school district has no organization, any ten voters may call a meeting of the district and proceed as provided in Section 162.441; and the secretary of the meeting shall certify, if the majority votes for annexation, to the board of directors of the six-director district, and the same action shall be taken as provided above."

Annexation under this statute is possible only where the automatic extensions provisions of the first paragraph of Section 162.421 apply. Since we have held that the automatic extension provisions of Subsection 1 do not apply, it therefore follows that the annexation provisions of Subsection 2 do not apply to this situation.

We assume from your letter that the proposed city extension will include a part, but not all, of the territory within the R-5 School District.

Honorable Andrew H. McColloch

Section 162.431, RSMo. Supp. 1967, provides for the changing of boundary lines between two six-director school districts. By means of this procedure, the voters of the school district of the City of St. Charles and the R-5 School District could redesignate the boundaries between the districts to coincide with the proposed extended city boundaries. However, this procedure has no relation to the extension of city boundaries or the provisions of Section 162.421, RSMo. Supp. 1967.

Therefore, we are of the opinion that the boundaries of the school districts can be changed to coincide with the proposed new boundaries of the city under Section 162.431 but not under the provisions of Section 162.421, RSMo. Supp. 1967.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The extension of the municipal boundaries of the City of St. Charles does not automatically extend the boundaries of the St. Charles School District under Section 162.421, RSMo. Supp. 1967, where the territory taken in by the extension of the city is contained within a six-director school district that maintains a high school.

2. The inhabitants of the area annexed by the City of St. Charles may not change the boundaries of the school district by election under Subsection 2 of Section 162.421, RSMo. Supp. 1967. However, the voters of the two school districts may change the boundaries between the school districts under the general change-of-boundary statute, Section 162.431, RSMo. Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

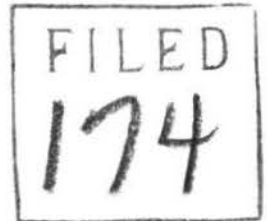
STATE EMPLOYEES'
RETIREMENT SYSTEM:
LEGISLATURE:
RETIREMENT:

A refund of accumulated contributions under Section 104.380, RSMo. Cum. Supp. 1967 for services rendered before October 13, 1967 by a member who retired before October 13, 1967 and

who is presently receiving a retirement annuity from the Missouri State Employees' Retirement System, would be in violation of Article I, Section 13 of the Missouri Constitution of 1945.

OPINION NO. 174-1968

September 19, 1968



Mr. Edwin M. Bode, Secretary
Missouri State Employee's
Retirement System
Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Bode:

This is to acknowledge receipt of your request for a formal opinion from this office which reads as follows:

"I would like to request a formal opinion in regard to Section 104.380, paragraph 3 as to whether or not a former member of the General Assembly who elects to accept legislative retirement benefits is entitled to a refund of his accumulative contributions made to the retirement fund for services rendered during other periods of state employment before October 13, 1967."

House Bill No. 33 of the 74th General Assembly repealed Section 104.380, RSMo. 1959 relating to the State Employees' Retirement System and enacted in lieu thereof one new section to be known as Section 104.380, relating to the same subject matter. Subsection 3 of Section 104.380, RSMo. Cum. Supp. 1967, now reads as follows:

"3. If a member, after serving six or more years as a member of the general assembly, is elected to a state office or is appointed to a state office or employment, he may, at the end of such term or employment, elect to take on retirement the amount which shall be due him for his creditable service as a

Mr. Edwin M. Bode

member of the general assembly or that which would be due him as such officer or employee. If he elects to accept the legislative retirement benefits, the amount of his accumulated contributions to the fund made during such term or employment shall, upon written application, be refunded to him."

The Missouri Supreme Court has taken the position that the legislature has established a comprehensive State Employee Retirement System, participation in which was voluntary, and membership in which created a contractual relationship, between the members and the state. See *State v. Missouri State Employees' Retirement System*, 362 SW2d 571. In this connection, Article I, Section 13 of the Missouri Constitution of 1945 prohibits any law which impairs the obligation of a contract. Therefore, it is our opinion that the primary issue for consideration is whether or not a refund of accumulative contributions made to the retirement fund for services rendered before October 13, 1967, by a member who retired prior to October 13, 1967, and who is now drawing an annuity from the State Retirement System would be in violation of the Missouri Constitution of 1945.

The leading authority on this issue is the case of *State v. Missouri State Employees' Retirement System*, supra. In this case, retired state employees brought an action in mandamus to require the Missouri State Employees' Retirement System to pay such employees an increase in benefits under a 1961 amendment to the 1957 statute.

On page 576 of the opinion, the holding of the court was as follows:

"The present amendment, applying as it purports to do to all members; would necessarily take a portion of the existing fund to pay the increases to retired members. We hold that this would constitute an impairment of the contract in violation of Section 13 of Article I, Mo. Constitution as to all members not retired on October 13, 1961, and who have since continued to contribute."

The Court further held that the payment of the increased benefits to retired members whose status was fixed prior to the effective date of the amendment, October 13, 1961, for no additional consideration, would deplete the fund to a substantial extent, and do so gratuitously.

It is submitted that the same conclusion is applicable to the matter in dispute. The factual situation as presented indicates

Mr. Edwin M. Bode

that the member retired prior to October 13, 1967, and in accordance with the provisions of the old law elected to receive his minimum retirement annuity to which he was entitled because of his service as a former member of the legislature rather than a refund of his accumulative contributions.

To hold now that he is entitled to a refund of his accumulative contributions under the present law, for services rendered prior to October 13, 1967, would result in an "increase" in his retirement allowance as it was then provided for under the old law. This would necessarily involve taking a portion of the existing retirement fund to pay the "increase" to a retired member. As a result of the decision in *State v. Missouri State Employees' Retirement System* supra, it is our belief that a refund of accumulative contributions under such circumstances would constitute an impairment of contract in violation of Article I, Section 13 of the Missouri Constitution of 1945 as to all members not retired on October 13, 1967, and who have since continued to contribute to the Missouri State Employees' Retirement System.

CONCLUSION

It is the opinion of this office that a refund of accumulated contributions under Section 104.380, RSMo. Cum. Supp. 1967, for services rendered before October 13, 1967, by a member who retired before October 13, 1967, and who is presently receiving a retirement annuity from the Missouri State Employees' Retirement System, would be in violation of Article I, Section 13 of the Missouri Constitution of 1945.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B.J. Jones.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

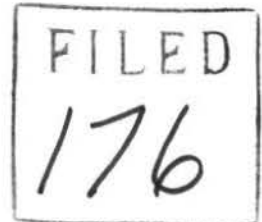
CENSUS:
POPULATION:
COUNTY COURTS:
COMPENSATION:
SALARIES:

The county court is not authorized to increase the salaries of county officers on the basis of common knowledge of an increase of population in the county since the last decennial census of the United States was taken in 1960. The salaries of such officers must be ascertained solely on the basis of the 1960 decennial census of the United States until January 1, 1971, the date that the 1970 census becomes effective.

OPINION NO. 176

February 8, 1968

Honorable Urban C. Bergbauer, Jr.
Prosecuting Attorney
Iron County
Ironton, Missouri 63650



Dear Mr. Bergbauer:

This is in response to your request for an opinion as to whether the County Court of Iron County is authorized to increase the salaries of those county officers whose salaries are based on the population of the county. Although the last decennial census of the United States (1960) shows that the population of Iron County was less than 10,000 inhabitants, you state that it is common knowledge that the population has increased substantially over the last few years and it is estimated at the present time that there is an excess of 11,000 inhabitants in the county. Your specific question is whether the County Court is authorized to increase the salaries of these affected offices based upon common knowledge of an increase of population in the county, or whether the county can call for a census to be taken to determine the population, or whether the County Court must await the next decennial census of the United States to be taken in 1970 before the affected offices may have an increase in salary.

Article VI, Section 7, Constitution of Missouri, 1945, provides that in each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be a county court and prescribes the duties of the court as follows:

"In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law."

Honorable Urban C. Bergbauer, Jr.

County courts are courts of limited jurisdiction and aside from the management of the fiscal affairs of the county, possess no powers except those conferred by statute. In the case of King vs. Maries County, 249 S.W. 418, the court said:

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute."

There is no authority expressly granted to the county court by statute to change or modify the salaries of these county officers or to call for a census to be taken which might serve as a basis for that purpose.

In Gill vs. Buchanan County, 142 S.W. 2d 665, 1.c. 688, the court stated that:

" * * * However, our conclusion is that a county's liability for a county officer's salary is incurred not just when each monthly installment thereof is payable, but, insofar as the constitutional provision herein invoked is concerned, the whole amount, due and payable during each year, must be considered from the beginning of the year. This must be true because the annual amount of such salary is fixed by the Legislature and no other officer or officers have authority to change it, either before or after it is due and payable. Nodaway County v. Kidder, 344 Mo. 795, 129 S.W. 2d 857; State ex rel. Rothrum v. Darby, Mo. Sup., 137 S.W. 2d 532. * * * "

The salaries of these county officers are fixed in relation to population by statute in effect at the date of their election. For the purpose of ascertaining the salaries of these officers the population is determined pursuant to paragraph 1, Section 1.100, RSMo 1959, as follows:

"(1) The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the

Honorable Urban C. Bergbauer, Jr.

amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of the 1960 decennial census of the United States is July 1, 1961, and the effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961; except that for the purposes of ascertaining the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants the effective date of the 1960 decennial census of the United States is January 1, 1961, and the effective date of each succeeding decennial census is January first of each tenth year after 1961."


It follows that in accordance with Section 1.100 the 1960 census became effective July 1, 1961, and that the population as shown by such census is required to be used in ascertaining the compensation payable to county officers.

CONCLUSION

It is the opinion of this office that the county court is not authorized to increase the salaries of county officers on the basis of common knowledge of an increase of population in the county since the last decennial census of the United States was taken in 1960, and that the salaries of such officers must be ascertained solely on the basis of the 1960 decennial census of the United States until January 1, 1971, the date that the 1970 census becomes effective.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, L. J. Gardner.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

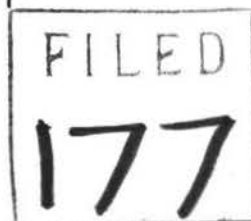
INSURANCE:
TRUE NAME:

"True name" as used in Section 375.012, subsection (2), RSMo Cum. Supp. 1967, means a person's actual and not fictitious name and includes a surname, a first name, and a middle name or initial.

May 2, 1968

OPINION NO. 177

Honorable J. Anthony Dill
Missouri House of Representatives
St. Louis County, District 44
8011 Grandvista Avenue
Affton, Missouri 63123



Dear Representative Dill:

This is in response to your letter of January 26, 1968, requesting an opinion in regard to Section 375.012, subsection (2), RSMo Cum. Supp. 1967. (All statutory references herein are to RSMo Cum. Supp. 1967 unless otherwise noted.) Your question was posed as follows:

"Section 375.061 states that no insurance agency shall act as such unless licensed. Section 375.012(2) defines an agency as any individual transacting business under any name other than his 'true name'.

Clearly, if an individual agent or broker named Joseph J. Jones did business as 'Acme Insurance Agency', he would be required to register as an agency. However, it is unclear if registration is required if the same Joseph J. Jones did business as 'Jones Insurance Agency'.

I respectfully request your opinion regarding this situation. Does 'true name' as used in 375.012 (2) mean 'full name' (Joseph J. Jones), merely true surname (Jones), or something else."

Section 375.012, subsection (2) contains the following definition:

Honorable J. Anthony Dill

"'Insurance agency'; any individual transacting or doing business under any name other than his true name, any partnership, unincorporated association, corporation, or other group transacting or doing business with the public or insurance companies as an insurance agent or broker;"

Section 375.061, subsection (1) requires that "No insurance agency shall act as an agency in this state unless it is licensed by the superintendent of insurance as provided in this chapter." If an individual is transacting business as an "insurance agency" under the definition found in 375.012(2), he is required to be licensed as an agency by the superintendent of insurance pursuant to the provisions of 375.061(1). Apparently, an individual can avoid the agency classification only by doing business under his "true name".

Section 1.090, RSMo 1959, relating to the construction of statutes, provides that "Words and phrases shall be taken in their plain and ordinary and usual sense....". Webster's New International unabridged dictionary, 2nd edition, defines the word "true" in the following manner: "Conformable to fact; in accordance with the actual state of things; correct, not false, erroneous, inaccurate, or the like;" The plain and ordinary meaning of "true" as it is defined in the dictionary will be followed here.

It is sometimes said that the word "name" contemplates a person's surname and a given first name. 65 C.J.S. 53. That was the rule followed at common law and it has subsequently been held that a person's middle name or initial was unimportant. State vs. Hands, Mo., 260 SW 2d 14. This viewpoint was initially expressed in State vs. Crowe, Mo., 382 SW2d 38, but in that case the St. Louis Court of Appeals went on to say: "However, in modern times recognition is frequently given to one or more middle names or initials." (Emphasis added). The court in the Crowe case then quoted with approval the following definition of "name" given by the Missouri Supreme Court in State ex rel Lane vs. Corneli, Mo., 149 SW 2d 815:

"A person's name is the designation ordinarily used, and by which he or she is known in the community. Names are used as a method of identification. Whether the identification is sufficient is ordinarily a question of fact." (Emphasis ours) Lane, at 821.

Honorable J. Anthony Dill

The Crowe case concluded by saying that "A person's name, therefore, is the designation by which he is commonly known and one which he knows himself and others call him." This common sense definition seems well established in Missouri law. State vs. Deppe, Mo., 286 SW 2d 776.

This brings us to the point where we must decide how much of a person's name must be used in order to satisfy the "true name" provision of Section 375.012 (2). In other words, must he use only his first and last name, or his name exactly as it appears on his birth certificate, or enough of his name so that he can be identified?

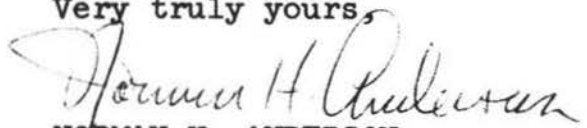
The legislative intent is controlling. The purpose of the Legislature in enacting Section 375.012(2) was to enable the Superintendent of Insurance to identify those under his jurisdiction by requiring them to do business in their true names, or failing in this, they must be registered as an agency. The statute will not achieve its purpose unless enough of a person's name is given so that he can be readily identified and distinguished from other persons. For this reason, we hold that "true name" as it appears in Section 375.012 (2) contemplates the use of a surname, a first name, and a middle name or initial.

CONCLUSION

It is the opinion of this office that "true name" as used in Section 375.012, subsection (2) RSMo Cum. Supp. 1967, means a person's actual and not fictitious name and includes a **surname**, a **first name**, and a middle name or initial.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Gary G. Sprick.

Very truly yours,

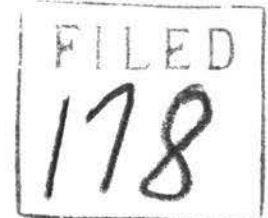

NORMAN H. ANDERSON
Attorney General

SCHOOLS: A six-director school district may acquire
SCHOOL BUILDING: ownership of realty by purchase of an
SCHOOL PROPERTY: undivided part interest as tenant in common.
TENANTS IN COMMON: However, as to that part and during that
time which the premises are used for school
purposes, exclusive control must be vested in the board of education
of the district.

OPINION NO. 178-1968

September 17, 1968

Honorable Marvin L. Dinger
State Representative
Iron County
Ironton, Missouri 36350



Dear Representative Dinger:

This official opinion is issued in response to your request for a ruling. You inquire whether or not a public school district can lawfully acquire an undivided part interest in realty as a tenant in common. Your inquiry states:

"St. Joseph Lead Company is willing to build and pay for a school for the use of Iron County Consolidated School District #4, at Viburnum, Missouri, according to plans and specifications approved by that school district.

"It is the wishes and desire of the Board of Education of that district to eventually acquire title to this property, but in order to have sufficient funds, this will require a period of approximately 15 years. There would be no contract in this regard.

"Is it lawful for the school district to acquire an undivided interest, such as a 1/15 interest (to be granted to it by deed), each year until the entire interest or ownership has been acquired?

"This would mean that the school district and St. Joseph Lead Company would be tenants in common as to their respective interests until the school district acquires the entire interest or ownership."

Honorable Marvin L. Dinger

Section 177.091, RSMo. Supp. 1967, states as follows:

"1. The school board in each six-director district, as soon as sufficient funds are provided, shall establish an adequate number of elementary schools, and if the demands of the district require more than one elementary school building, the board shall divide the district into elementary school wards and fix the boundaries thereof. The board shall select and procure a site in each ward and erect and furnish a suitable school building thereon.

"2. The board may also establish high schools and may select and procure sites and erect and furnish buildings therefor * * * "

Section 177.091 supra imposes upon the board of education of six-director districts the power to establish elementary and high schools. The statutes do not spell out any exclusive method which the board must use in establishing these schools. The Supreme Court of Missouri in the case of Hart et al v. Board of Education of Nevada School District et al, Mo., 252 SW 441, 442 stated:

"Under the statutes of this state * * * the school boards, and they alone, are intrusted with the duty of providing and maintaining school facilities, including sites, school houses and furnishings. The methods and means to be employed in the discharge of these functions are committed wholly to their judgment and discretion."

In the case of Kemper et al vs. Long et al, Mo., 212 SW 871, the school district rented a room in which it conducted a high school. The court construed the word "establish" as used in Section 10869, RSMo. 1919 (the statutory predecessor of Section 177.091 supra), as referring to "the school rather than the site and building".

The court stated l.c. 872, 873:

" * * * the Legislature did not intend to preclude an arrangement for high school buildings in such districts, in circumstances like those appearing in this record, by means other than the purchase of sites and the erection of buildings thereon by the district * * * "

Honorable Marvin L. Dinger

In such circumstances, since a building is necessary, and since the board is not confined by this section to erecting a building, the board is left free, so far as this section is concerned, to acquire one by other lawful means. The word 'establish' has itself been held to include power to rent."

These authorities lead us to the opinion that school boards may acquire buildings for school purposes by any common method of legally acquiring possession or ownership of real estate. This would include tenancies in common. However, we further are of the opinion that any arrangement must vest control of the property wholly in the school board as to that part and during that time which the property is used for school purposes.

Section 177.011, RSMo. Supp. 1967, states:

" * * * All property leased or rented for school purposes shall be wholly under the control of the school board during such time. * * * "

Although this statute expressly mentions only lease-hold interests, we consider it to express a public policy that control of premises when used for school purposes must be exclusively in the school board and cannot be shared. Thus, where a board acquires ownership of realty through the purchase of an undivided partial interest, it is necessary that the board establish exclusive control over the premises when and where they are used for school purposes. This may be done by appropriate lease or contract arrangements.

Our opinion rules only on the legality of methods of acquiring possession and ownership of realty for school purposes. Whether or not a particular method is advisable, is a matter within the sound discretion of the board of education. We express no opinion as to advisability.

We also direct your attention to Article VI, Section 26(a), Missouri Constitution, Section 165.021, RSMo. Supp. 1967, which prohibit indebtedness by a school district in excess of current revenue. Also see enclosed Letter Opinion No. 7, Burlison, 3/2/64.

CONCLUSION

It is the opinion of this office that a six-director school district may acquire ownership of realty by purchase of an undivided part interest as tenant in common. However, as to that part and during that time which the premises are used for school

Honorable Marvin L. Dinger

purposes, exclusive control must be vested in the board of education of the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure:

Letter Opinion No. 7
Burlison, 3/2/64

February 23, 1968



The Honorable R. D. "Pete" Rodgers
State Representative, 9th District
Room 414, Capitol Building
Jefferson City, Missouri 65101

Re: Opinion Request No. 182

Dear Pete:

This is in response to your letter of February 1, 1968, relative to a request for an opinion in regard to RSMo, Section 305.520(2).

This office is in a position to render an opinion in this matter. However, it has been a long-standing precedent and rule that opinions will not be rendered in cases where there is any pending litigation.

From the contents of the file and your letter, I see that there are numerous cases pending in the magistrate courts in Kansas City, Missouri.

Mr. Burns further explained to me that you were interested in the opinion to determine whether or not the matter could be spelled out more clearly by way of new legislation.

I'm very sorry that I will not be able to render this opinion but would be happy to discuss this matter with you at your convenience.

Yours truly,

NORMAN H. ANDERSON
Attorney General

NHA/hw

cc: C. B. Burns, Jr.
Assistant Attorney General

TRAINING SCHOOLS:
JUVENILE COURTS:
SENTENCES:

The order of commitment of a delinquent juvenile must be made in accordance with jurisdiction conferred by the legislature. Such an order seeking to limit the period of commitment to the time when the child committed reaches eighteen years of age is invalid and cannot be applied because the controlling statutes require that all such commitments be for an indeterminate period.

February 29, 1968

OPINION NO. 186

Mr. W. E. Sears, Director
State Board of Training Schools
State of Missouri
Box 447
Jefferson City, Missouri 65102



Dear Mr. Sears:

This is in response to your request for an opinion concerning the duration of commitments to the State Board of Training Schools in view of a recent court order as follows:

"Wherefore it is by the court considered, ordered, adjudged, and decreed, that said child be and is hereby declared in need of training school education and discipline, and is accordingly, committed to the custody of the State Board of Training Schools to be by them dealt with in all respects as required by law and for an indeterminate period but not longer than the period until said child shall have attained the age of eighteen."

Although not stated in the opinion request, we assume that the order was made by a juvenile court.

Section 211.041 RSMo 1959, provides that a child coming under the aegis of the juvenile court may remain under the jurisdiction of the court until attaining age 21, " * * * except in cases where he is committed to and received by the State Board of Training Schools."

Section 211.191 RSMo 1959, provides that, " * * * in all commitments [to the state training schools] the law in reference to them shall govern."

Section 219.160 RSMo 1959, provides that:

" * * * Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his twenty-first birthday, all commitments to the board shall be made for an indeterminate period of time."

The order of commitment in question seeks to limit the period of time during which the child committed may be held in custody and is therefore contrary to the provisions of Section 219.160, supra. This situation is analogous to the circumstances outlined in State v. Campbell, Mo., 307 S.W.2d 486, 490, where the court stated.


" * * * the inclusion of an unlawful and ineffective provision in a judgment of conviction, otherwise valid, does not render the entire judgment void, because the portion of the sentence which is contrary to law will be treated as surplusage and disregarded."

CONCLUSION

The order of commitment of a delinquent juvenile must be made in accordance with jurisdiction conferred by the legislature. Such an order seeking to limit the period of commitment to the time when the child committed reaches eighteen years of age is invalid and cannot be applied because the controlling statutes require that all such commitments be for an indeterminate period.

This opinion which I hereby approve was prepared by my assistant, Mr. Howard L. McFadden.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

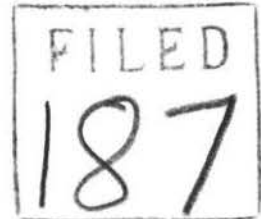
MOTOR VEHICLES:
TRUCKS AND TRACTORS:
TRACTORS NOT REQUIRED TO
HAVE MUD FLAPS:

A tractor used for pulling a trailer or semi-trailer is not when being driven without the trailer or semi-trailer a truck and, therefore, does not come within the purview of Section 304.265, Mo. Supp., 1967, and is not required to have mud flaps for its rear wheels.

OPINION NO. 187

May 23, 1968

Honorable Kenneth J. Rothman
State Representative - 36th District
Missouri House of Representatives
7730 Carondelet Avenue, Suite 203
Clayton, Missouri 63105



Dear Representative Rothman:

On February 6, 1968, you requested an opinion from this office as follows:

"A sentence in Section 1 of RSMo 304.265 reads as follows: 'It shall be unlawful for any person to operate upon the public highways of this state a truck or truck-tractor trailer without rear fenders, which is not equipped with mud flaps for the rear wheels.'

"The question which I pose to you is whether or not this sentence would require that mud flaps be placed on the tractor being operated by itself without an accompanying trailer."

Section 304.265, Mo. Supp. 1967, provides:

"1. It shall be unlawful for any person to operate upon the public highways of this state a truck or truck-tractor trailer, without rear fenders, which is not equipped with mud flaps for the rear wheels. If mud flaps are used, they shall be wide enough to cover the full tread width of the tire or tires being protected; shall be so installed that they extend from the underside of the vehicle body in a vertical plane behind the rear wheels to within eight inches of the ground; and shall be constructed of a rigid material or a flexible material which is of a sufficiently rigid character to provide adequate protection when the vehicle

Honorable Kenneth J. Rothman

is in motion. No provisions of this section shall apply to a motor vehicle in transit and in process of delivery equipped with temporary mud flaps.

"2. Any person who violates this section is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law."

Section 301.010, RSMo, as used in Chapter 301 and Sections 304.010 and 304.040 and 304.120 to 304.570 the following terms are defined as follows:

"(26) 'Tractor', any motor vehicle, designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provision for carrying loads independently;

"(27) 'Trailer', any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, except those running exclusively on tracks, including a semi-trailer or vehicle of the trailer type so designed and used in conjunction with a self-propelled vehicle that a considerable part of its own weight rests upon and is carried by the towing vehicle;"

Under the above statute these terms apply to Section 304.265, supra. It is to be noted that the term "tractor" and "trailer" are defined, but there is no definition of the term "truck-tractor trailer" found in any of the statutes governing this matter. It is our duty to determine what the legislature meant by the use of the term "truck-tractor trailer" as used in this statute, whether it is to be considered as two vehicles or as one vehicle.

In determining the meaning and application of a statute, we should try to ascertain the legislative intent for the word used if possible and put upon such language the plain and rational meaning and promote the object. *State ex rel Curators of the University of Missouri v. Neill*, 397 S. W. 2d 666.

Failure to comply with the terms of Section 304.265 is considered a misdemeanor. It is a cardinal rule of construction that a criminal statute should be strictly construed against the state and in favor of the accused. *State vs. Katz Drug Company*, 352 S. W. 2d 678.

Honorable Kenneth J. Rothman

Although the word "truck" is not defined by statute, it is common knowledge that it is a vehicle equipped and used for hauling freight. In Black's Law Dictionary, Deluxe Fourth Edition, page 1679, the term "truck" is defined as:

"Wheeled vehicle for carrying heavy weight;
an automobile for transporting heavy loads.
Paltani v. Sentinel Life Ins. Co., 121 Neb.
447, 237 N. W. 392."

Section 304.265, supra, makes it unlawful to operate upon the public highways of this state a "truck" or "truck-tractor trailer" without rear fenders which is not equipped with mud flaps for the rear wheels. It is further provided that the mud flaps shall be installed so that they extend from the "underside of the vehicle body in a vertical plane behind the rear wheels". A "tractor" as defined in Section 301.010, supra, is a motor vehicle having no provisions for carrying loads independently. In other words, it is a motor vehicle without "body" for carrying loads independently.


In considering that statute as a whole, and construing it strictly against the state since it is a criminal statute, we believe that the legislature intended that the words "truck-tractor trailer" were to be considered as one vehicle and that the mud flaps should be installed on the rear wheels of the trailer part of such vehicles and not on the rear wheels of the tractor part of the vehicle.

CONCLUSION

It is the opinion of this office that a tractor used for pulling a trailer or semi-trailer is not when being driven without the trailer or semi-trailer a truck and, therefore, does not come within the purview of Section 304.265, Mo. Supp. 1967, and is not required to have mud flaps for its rear wheels.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

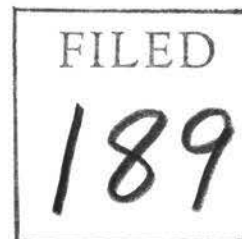
Yours very truly,


NORMAN H. ANDERSON
Attorney General

April 30, 1968

Opinion No. 189 - Answered by
Letter - Brannock

Missouri State Board of Accountancy
312 East Capitol Avenue
Post Office Box 613
Jefferson City, Missouri 65101



Dear Sirs:

We have your request for an opinion, in which the second question you ask is as follows:

"2. Must the Board of Accountancy require a person holding a CPA Certificate issued by another state to obtain a Missouri Certificate through reciprocity and an annual permit to practice if such person is engaged in public accounting in the State of Missouri by reason of being employed within the state by a public accounting firm or an individual practitioner? About a year ago the Board was informed verbally by Mr. Donald L. Randolph, of your office, that such a person would be required to obtain a reciprocal Certificate and an annual permit in order to avoid being held in violation of the Missouri Accountancy Law. Based upon this advice, the Board directed a letter (copy of which is enclosed) to all public accounting firms in the state. In the enforcement of its position, the Board believes it desirable to obtain a written ruling from your office on this matter."

A copy of your notice of November 22, 1967, to all public accounting firms attached thereto is as follows:

Missouri State Board of Accountancy

"To All Public Accounting Firms:

The attorney general of the state of Missouri has informed the Missouri State Board of Accountancy that a person holding a certified public accountant certificate from another state who is employed in public accounting in Missouri is in violation of this state's accountancy law if he does not hold a Missouri certificate as well.

If you have such a person in your employ, the board would appreciate it if you would have him apply for a Missouri CPA certificate by reciprocity."

This office issued Opinion No. 204, answered by letter (Randolph), dated July 1, 1964, which we believe answers your question. It will be noted that Chapter 326, RSMo 1959, has been supplemented by Chapter 326, RSMo Supp. 1967. However, the contents of Chapter 326, RSMo Supp. 1967, pertinent to your question, have not materially changed the section, so said opinion is responsive to your question.

A copy of said opinion is attached hereto. The concluding sentence therein, ". . .In short, a person does not become exempt from the operation of Chapter 326 simply by accepting employment in an accounting firm.", is particularly applicable.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

AB:1ch

Enclosure: Op. 204 - 7-1-64 - Berry

INDUSTRIAL COMMISSION:
UNEMPLOYMENT COMPENSATION:

Employee who retires under union contract not eligible for unemployment compensation.

OPINION NO. 190

May 23, 1968

Honorable James W. Williams
State Representative
Missouri House of Representatives
2010 North 4th Street
St. Joseph, Missouri 64505



Dear Representative Williams:

On February 12, 1968, you requested an opinion from this office as follows:

"Per our telephone conversation this date I am writing for an opinion from your office. If a person is under a union contract with a compulsory retirement clause at age 65, if he is compelled to retire, can he draw his unemployment compensation before signing up for Social Security? My feeling is that any man who is forced to retire should be entitled to draw his unemployment insurance first, then sign up for his Social Security and be repaid back to his sixty-fifth birthday. I believe that the money for his unemployment insurance is paid into his account by the company and because the contract forces him to retire, this is money due him and if not paid reverts back to the company account."

As we understand the facts that you have submitted, the employee in question is working under union contract which requires him to retire from that employment at the age of 65.

Section 288.020, RSMo, provides that as a guide to the interpretation and application of a Missouri Employment Security Law, the public policy of this state requires compulsory setting aside of employment reserves to be used for the benefit of persons unemployed through no fault of their own.

Honorable James W. Williams

Section 288.050, RSMo, provides that an employee who leaves his work voluntarily without good cause attributable to his work or to his employer shall be disqualified for benefits until he has earned wages equal to 10 times his weekly benefit amount.

Section 288.040, Mo. Supp., provides that in order for an employee to be eligible for unemployment benefits he must be registered for work in the employment office and be able, available, actively and earnestly seeking work. It further provides that he shall be ineligible for unemployment benefits for any week for which he is receiving or has received remunerations from old age assistance benefits under Title II of the Social Security Act if it exceeds his weekly benefit amount of unemployment compensation he receives.

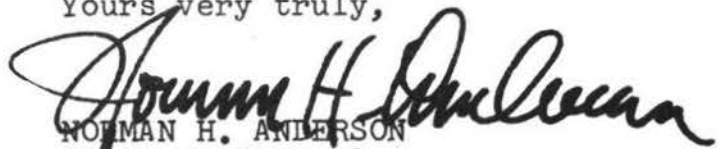
A contract between the employer and the union is as binding upon each member of the union as though each individual member personally entered into the agreement with the employer. *Kilgore v. Industrial Commission of Missouri*, 337 S. W. 2d 91 and *Dubinsky Brothers, Inc. v. Industrial Commission of Missouri*, 373 S. W. 2d 9. When an employee's employment is terminated when he reaches age 65 pursuant to the terms of the union contract to which he by reason of his membership in the union is a party, he leaves his work voluntarily and without good cause attributable to his work or to his employer. He is therefore disqualified of unemployment benefits as provided under Section 288.050. Furthermore, an employee is ineligible for unemployment benefits for any week in which he receives or has received social security benefits exceeding the amount of his unemployment benefits under Section 288.040, supra.

CONCLUSION

It is the opinion of this office that an employee who as a member of a union terminates his employment when he reaches 65 years of age pursuant to the union contract does so voluntarily and without cause attributable to his employer and is disqualified for unemployment benefits for the period of time as provided in Section 288.040, Mo. Cum. Supp.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

INDUSTRIAL DEVELOPMENT: A county may not condemn property for
purposes:
D: industrial development.

OPINION NO. 192

August 22, 1968



Honorable James Millan
Prosecuting Attorney
Pike County Courthouse
Bowling Green, Missouri 63334

Dear Mr. Millan:

This opinion responds to your inquiry whether cities or counties have power to condemn property for industrial development purposes.

In order to lay a predicate for our conclusions, it is necessary that basic principles of eminent domain be understood. Thus, the power of eminent domain resides in the legislature and may be only exercised through such agencies as it may create, subject to the restrictions imposed by our constitution. See Chicago, B & Q R. Co. v. McCooey, 273 Mo. 29, 200 S.W. 59; State ex rel St. Louis Union Trust Co. v. Ferriss, Mo., 304 S.W.2d 896; and State ex rel Coffman v. Crain, Mo.App., 308 S.W.2d 451. The right of eminent domain must be given in express terms or by necessary implication, as these statutes on eminent domain are strictly construed. The Missouri Supreme Court, en banc, State ex rel Missouri Water Co. v. Bostian, Mo.App., 280 S.W.2d 663, 666, says:

"Statutes granting the right of eminent domain are to be strictly construed. The rule is well settled in this state. The right is not to be implied or inferred from vague or doubtful language but must be clearly given in express terms or by necessary implication. State ex rel. Cranfill v. Smith, 330 Mo. 252, 257, 48 S.W.2d 891, 893, 81 A.L.R. 1066; Southwest Missouri Light Co. v. Scheurich, 174 Mo. 235, 241, 73 S.W. 496, 497; Houck v. Little River Drainage Dist., 343 Mo. 28, 37, 119 S.W.2d 826, 831; 18 Am.Jur., Eminent Domain, Sec. 26, p. 650. In applying the rule, statutes granting the power to take private

Honorable James Millan

property for public use are strictly construed against those who seek to avail themselves of the benefit of such statutes and the power is not to be extended beyond the plain provisions of the statute relied upon. *Schmidt v. Densmore*, 42 Mo. 225, 234. On the other hand, 'while eminent domain statutes are to be strictly construed so far as the power to condemn is concerned, yet they are not to be construed so as to defeat the evident purpose of the Legislature.' *State ex rel. Siegel v. Grimm*, 314 Mo. 242, 284 S.W. 490, 493; 29 C.J.S., Eminent Domain, § 22, p. 806. Further, the doctrine of strict construction does not exclude a reasonable and sound construction of the statute under consideration. *Kansas City Interurban R. Co. v. Davis*, 197 Mo. 669, 676, 95 S.W. 881."

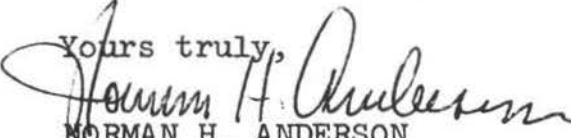
Insofar as a municipality is concerned, the right of eminent domain cannot be exercised by a city without authority from the state. See *In Re Armory Site in Kansas City*, Mo., 282 S.W.2d 464, 467. Thus, the question of the right of a particular city to exercise eminent domain would depend on whether such right had been delegated to the city by the relevant statutes or under its charter, if any. See *Kansas City v. Ashley*, Mo., 406 S.W.2d 584. Inasmuch as this office is not authorized to advise cities under the statute (Section 27.040, RSMo 1959), we may not therefore properly comment on this area since this function of advising the city is a responsibility of a city attorney or city counselor.

Your question involving the right of the county to condemn for industrial purposes, must be answered in the negative. There exists no authority under the constitution or statutes of Missouri for a county to construct, lease or dispose of industrial development projects as is provided in the case of cities under Sections 23(a) and 27 of Article VI, Missouri Constitution, and Sections 100.010 to 100.200, RSMo Supp. 1967. For this reason we must answer in the negative.

CONCLUSION

It is the opinion of this office that a county may not condemn property for industrial development projects.

The foregoing opinion, which I hereby approve, was prepared by my assistant Richard C. Ashby.

Yours truly,

NORMAN H. ANDERSON
Attorney General

RABIES CONTROL:
COUNTY HEALTH OFFICER:
COUNTY COURT:

In the absence of a county health commissioner, the county court has no power to prepare regulations with regard to dog control for protection against rabies.

OPINION NO. 193

April 2, 1968



Honorable Omar J. Dames
State Representative
104th District
Route 3, P. O. Box 76
O'Fallon, Missouri 63366

Dear Representative Dames:

This opinion is written in response to your question as to whether or not the County Court in St. Charles County, in the absence of a County Health Commissioner, may set up rules and regulations with regard to dog control for protection against rabies.

The controlling statute with regard to these regulations is Section 322.090, RSMo 1959, made applicable to certain counties of the second class by Section 322.120, RSMo Cum. Supp. 1967.

Section 322.090 provides:

"For the purpose of promoting the public health and safety and to prevent the transmission of rabies and to control rabies and to carry into effect the purposes and provisions of sections 322.090 to 322.130, the county court is hereby empowered to adopt by order, rules and regulations which shall include provisions for licensing, catching, impounding, confinement, redemption and isolation and destruction of dogs; * * * "
(Emphasis added)

Section 322.100 provides:

"The county health commissioner shall prepare the regulations authorized to be adopted under the provisions of sections 322.090 to 322.130 * * * " (Emphasis added)

Read together these statutes give the county court the power to adopt by order the regulations prepared by the county health commissioner. This is not the power to create these regulations.

Honorable Omar J. Dames

To adopt means:

"To take or receive as one's own (esp. what is not so naturally); to select and take or approve; as to adopt the view or policy of another * * * "
Webster's New International Dictionary,
Second Edition, 1950, p. 35.

It is a general rule that public officers have only such power and authority as is clearly conferred by law or necessarily implied from the powers granted. 67 C.J.S., Officers, Section 102, p. 366.

A look at the underscored portions of the previously cited sections indicates that the legislature was specific in saying that the county health commissioner shall prepare the regulations and the county court shall enforce the regulations by adopting them.

These sections were enacted at a time when the counties were not required to have a health commissioner, yet the legislature made no alternative provision for creating these regulations, thus they must have intended that the county health commissioner be the exclusive source of the regulations. In the absence of a county health commissioner, there is no person authorized to prepare the regulations and, consequently, there is nothing for the county court to adopt. This being the only power granted to the county court, they are without authority to act in this area.


If the county court does wish to adopt a dog control law, they could, under Section 192.260, appoint a county health commissioner at the nominal salary of a dollar per year. This would put them in a position to proceed to act within Sections 322.090 and 322.100. However, such health officer would be subject to all the duties imposed upon him by Section 192.280 and not merely limited to dog control.

CONCLUSION

Therefore, it is the opinion of this office that in the absence of a county health commissioner, the county court has no power to prepare regulations with regard to dog control for protection against rabies.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

ASSESSORS:
TOWNSHIP ASSESSORS:
COUNTY COURT:
COMPENSATION:
FEES, COMPENSATIONS AND SALARIES:

The county court has the duty of paying the statutory fees as set out in Section 65.240, RSMo Supp. 1967, Section 65.245, RSMo 1959, and Section 261.070, RSMo 1959, to the township assessors and that the State Tax Commission has no authority to order the county court to withhold payments of such fees because the Tax Commission believes the property valuations of such assessors are too low.

OPINION NO. 196

May 14, 1968

Honorable Paul McGhee
Prosecuting Attorney of
Stoddard County
16 North Elm Street
Dexter, Missouri 63841



Dear Mr. McGhee:

We have your request for an opinion of this office which is as follows:

"Stoddard County is a county of the third class having township organization, and therefore has township assessors. Such assessors are paid on a fee basis under the provisions of Section 65.240 and Section 65.245, R.S. Mo. 1959. It is also noted that there is a provision for compensation under Section 261.070. There has been some complaint on the part of the State Tax Commission that the assessed valuation for Stoddard County is too low. Some representatives of the State Tax Commission, and some members of the public, have urged the County Court to withhold payment to the township assessors of their statutory fees unless such assessors place valuations upon the property within their respective townships that meet with the approval of the State Tax Commission.

I respectfully request your opinion as to whether the County Court has the authority to withhold from township assessors their statutory fees upon the basis that the township assessors are placing a valuation upon property that is too low to satisfy the State Tax Commission."

Honorable Paul McGhee

The pertinent provision of Section 65.240, RSMo Supp. 1967, is as follows:

"The ex officio township assessor in each township, in counties of the third and fourth classes, which now or may hereafter have township organization, as compensation for his services, shall receive sixty-five cents for each list taken by him; and for each tract of land or town lot assessed by him, and properly entered in the township land book, he shall receive ten cents; and for each entry in the tangible personal property tax book, he shall receive five cents; one-half to be paid by the county and one-half by the state, as now provided by law. . . ."

There is no duty in said section, for the assessor to be paid such fees, other than that he shall take a list, assess real and tangible personal property and enter such assessments in the proper tax books.

Section 65.245, RSMo 1959, is as follows:

"The ex officio township assessor in each township, in counties of the third and fourth classes, which now or may hereafter have township organization shall receive for visiting the establishments of each merchant and manufacturer as required by sections 150.055 and 150.325, RSMo, a fee of forty-five cents, and for making each report required by sections 150.060 and 150.330, RSMo, a fee of six cents; provided, that one-half of the compensation provided in this section shall be paid out of the county treasury and the other one-half out of the state treasury."

There is no duty for the assessor being paid such fees, other than visiting the establishments, required by Sections 150.055 and 150.325, RSMo 1959, of merchants and manufacturers and making each report required by Section 150.060, RSMo 1959, and Section 150.330, RSMo 1959.

The pertinent part of Section 261.070, RSMo 1959, paragraph two is as follows:

Honorable Paul McGhee

"2. The assessor shall receive for such additional assessment service as required in this section an additional fee of ten cents for each individual statistical listing of land acreage and other accompanying agricultural statistics filed by him with the commissioner of agriculture," (Emphasis added).

This statute has been construed in State v. Woods, 296 S.W. 381, 1.c. 382,

". . . Whether the statute in that respect is effective, valid, or constitutional is of no concern whatever to the county assessor. State v. Williams, 232 Mo. 56, 133 S.W. 1. It is clearly valid as to him. His duties in the premises are clearly and definitely prescribed. . . ."

With regard to your specific question which is as follows:

"I respectfully request your opinion as to whether the County Court has the authority to withhold from township assessors their statutory fees upon the basis that the township assessors are placing a valuation upon property that is too low to satisfy the State Tax Commission."

The pertinent part of Section 50.160, RSMo 1959 is:

"The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts;" (Emphasis added).

The Supreme Court in Jackson County vs. Fayman, 44 S.W.2d 849, discusses at length the duties and powers of the county courts with regard to auditing and paying claims presented to them, and it says at 1.c. 852,

"The power and authority of county courts and the capacity in which such body acts in auditing and paying claims against the county has been before this court for decision many times. We think that it is now well set-

Honorable Paul McGhee

tled that county courts do not act judicially in allowing, adjusting, or refusing claims presented against the county, or necessarily arising from managing its financial affairs. While such body does not act in a purely ministerial capacity in such matters, in the sense that they act without investigation and have no discretion in the matter, yet they do not try the merits of the claim as a court, but rather act as auditing financial agents of the county whose action is not final in the sense that a judgment of the court is final except on appeal or by other appropriate remedy."

The Court further says at l.c. 853,

"It has been held by this court, through an unbroken line of decisions since the case of Marion County v. Phillips, 45 Mo. 75, that the action of the county court in making settlements with county officials is not judicial, but that, in such cases, the judges act merely as the fiscal or administrative agents of the counties. State v. Roberts, 60 Mo. 402; State v. Roberts, 62 Mo. 388; Cole County v. Dallmeyer, 101 Mo. 57, 13 S.W. 687; State v. McGonigle, 101 Mo. 353, 13 S.W. 758 [8 L. R. A. 735, 20 Am. St. Rep. 609]. . . .'

* * * * *

This case has not been overruled, but approved many times, and the same doctrine was restated in State ex rel. v. Diemer, 255 Mo. 336, 351, 164 S.W. 517, 521, in this language: 'In the allowance of claims against a county, or in settling with county officers, county courts do not act so strictly as a court, or in the performance of a judicial function, and their allowance or disallowance of a claim is res adjudicata. . . .'

The case discussed and referred to with approval by the Supreme Court in Perkins v. Burks, 78 S.W.2d 845, refers and says,

Honorable Paul McGhee

" . . . For a discussion of the powers and duties of the county court in auditing and settling demands against the county, see Jackson County v. Fayman, 329 Mo. 423, 44 S.W.(2d) 849. . . ."

The court further says at l.c. 848,

"In the Rose Case, (State ex rel. Mitchell v. Rose, 313 Mo. 369, 281 S.W. 396, 398), however, the question was not concerning a salary fixed in amount by law, but mandamus was there brought to compel payment of a bill of the local registrar of vital statistics of the state board of health whose pay was provided by statute as 25 cents for each birth and death certificate. This necessarily raised a fact question, namely, the actual number of births and deaths occurring and the computation of the total amount due therefor. This court held that the county court had the right and the duty to audit the claim to determine its correctness and, in case of a disagreement about it, to demand that the matter should be decided by the courts either by the suit against the county or by a continuation of the matter before it by the appeal method provided by statute. . . ."

It is quite apparent that the court found that the County Court should only decide a fact question, the actual number of births and deaths and that they should compute the total amount due therefore.

In Coleman v. Kansas City, Mo., 173 S.W.2d 572, the Supreme Court discusses the rights of a public officer to be entitled to payment for his services, while the public officer in question in this case was an official of Kansas City, Missouri, the question as to whether or not he had performed his duty and was thus entitled to compensation arose and the Court therein stated as follows at l.c. 577,

"During the time Murray held the office, he is entitled to the salary fixed by law as an incident to that office. 'Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed,

Honorable Paul McGhee

but is incidental to the office.' State ex rel. Evans v. Gordon, 245 Mo. 12, loc. cit 27, 149 S.W. 638, loc cit. 741. Also, see State ex rel. Chapman v. Walbridge, 153 Mo. 194, 54 S.W. 447. State ex rel. Vail v. Clark, 52 Mo. 508."

From the foregoing statutes and cases, supra, the county court audits, settles and adjusts all accounts and it orders warrants issued by the county clerk for the payment of accounts presented to it for payment. It will be noted that the power of the county court extends to all such accounts and, there is no provision in any of the statutes, supra, that authorizes the State Tax Commission to audit, settle and adjust accounts of a county. We believe that the only powers that the county court has in auditing the demands of township assessors for compensation in making out assessment lists, is to determine the actual number of lists made out by the township assessors.

Any action that the State Tax Commission might take in instructing and advising the county court to refuse to pay the assessor for duties performed as aforesaid pursuant to Sections 65.240, RSMo Supp. 1967, 65.245, RSMo 1959, and 261.070, RSMo 1959, is not provided for or authorized by reason that the township assessors are placing a valuation upon property that is too low to satisfy the State Tax Commission. Section 137.480, RSMo 1959, is as follows:

"It shall be the duty of the state tax commission to make out and forward to the county clerks of the several counties that have or may hereafter adopt township organizations for the use of such county clerks and other officers, suitable forms and instructions relating to the discharge of their duties; and all such instruction shall be strictly complied with by said officers; . . ."
(Emphasis added).

This section limits the State Tax Commission's duty to forwarding suitable forms and instructions to county clerks and other officers.

The State Tax Commission does not have the implied or expressed duty to cause or order the county court to withhold from the township assessors their statutory fees, by reason of valuations for assessment purposes, that are too low to satisfy the Commission.

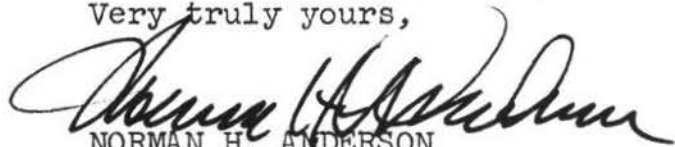
Honorable Paul McGhee

CONCLUSION

It is therefore the opinion of this office that the county court has the duty of paying the statutory fees as set out in Section 65.240, RSMo Supp. 1967, Section 65.245, RSMo 1959, and Section 261.070, RSMo 1959, to the township assessors and that the State Tax Commission has no authority to order the county court to withhold payments of such fees because the Tax Commission believes the property valuations of such assessors are too low.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Arnold Brannock.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

Opinion # 201

Honorable Clifford A. Falzone
Prosecuting Attorney of Randolph County
220 1/2 West Reed Street
Moberly, Missouri 65270

Dear Mr. Falzone:

This opinion is in response to the following questions you asked concerning the County Assessor of Randolph County:

1. Must the county assessor, in a third class county, not under township organization file the assessment lists, returned by the tax payers, with the county clerk?
2. Can the county clerk refuse to certify to the county treasurer and the Director of Revenue the amount due the assessor for the current twelve month period until the assessor files the assessment lists with the clerk?
3. Can the county assessor correct an error he made on the real estate book, after the book has been returned to the county court?
4. Can the county collector alter or change the real estate tax book?

First, the county assessor must file the assessment lists with the county clerk. Section 137.155, RSMo 1959, provides each individual list shall be signed with an oath and the list and oath shall be filed by the assessor in the office of the county clerk, who shall preserve and keep them. This statute was derived from Section 9759, RSMo 1929, which is discussed in enclosed Attorney General's Opinion No. 43, issued to Mr. S. R. Hunter, Assessor of New Madrid County, on March 3, 1939.

Second, the county clerk is not obliged to certify to the county treasurer and the Director of Revenue the amount due the assessor until the assessor files the assessment lists with the clerk. The county assessor has a statutory duty to return the assessor's book to the county court on or before the 31st day of May in every year, Section 137.245, RSMo 1959, and to file the list

and oath in the office of the county clerk, after he has completed the assessor's book. Section 137.155, RSMo 1959. The county clerk has a statutory duty to certify to the treasurer of his county and to the Director of Revenue the amount due the assessor of his county for the current twelve month period, not later than June 15. Section 53.147, RSMo Supp. 1967. The county assessor in class three counties is paid, "sixty-five cents per list, and each county assessor shall be allowed a fee of eight cents per entry for making real estate and tangible personal assessment books." Section 53.130, RSMo 1959. Therefore, it is reasonable for the county clerk to insist upon the return of the lists before certifying the amount due the assessor. The general rule in regard to the compensation of a public official is stated in *Nodaway County v. Kidder*, 129 S. W. 2d 857, 860, as follows:

The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too, must be strictly construed as against the officer."

Third, the county assessor may not correct an error he made on the real estate book, after the book has been returned to the county court. The assessor must make out the assessor's book, and return it to the county court with the oath that, so far as he has been able to ascertain, all taxable property in the county is correctly set forth and the value stated. Section 137.245 (1), RSMo 1959. After he has done this, his jurisdiction has terminated. This question is discussed in Attorney General's Opinion No. 15, issued to the Honorable John R. Caslavka on September 6, 1955, concerning the right of a township assessor to correct errors on his book after it has been turned over to the county clerk. The reasoning is equally applicable to county assessors. This reasoning is found, also, in Attorney General's Opinion No. 70, issued to the Honorable Elmer Peal on January 31, 1953, which holds that the county assessor may not add lists to the assessor's book after his book has been turned over to the county clerk.

Fourth, the county collector may not alter or change the tax books, or reduce an assessment. The collector has no authority to change the tax books, and the Missouri cases have held that he is prohibited from doing so. Attorney General's Opinion No. 10, issued to the Honorable Ted A. Bollinger, November 9, 1949.

If any change in the tax book is ordered by the county court, under Section 137.270, RSMo 1959, the county clerk is authorized

to correct the tax book, not the county collector. Section 137.260 RSMo 1959. It should be noted that the county court's power to take action is more limited than that of the county board of equalization. The county court may not change the valuation placed on property by the assessor or the board of equalization. Section 137.270, RSMo 1959, construed in Attorney General's Opinion No. 13, issued to the Honorable Hilary A. Bush on August 12, 1946.

It is our view that:

1. The county assessor, in a third class county, must file assessment lists with the county clerk.
2. The county clerk can refuse to certify to the county treasurer and the Director of Revenue the amount due the assessor for the current twelve month period until the assessor files the assessment lists with the clerk.
3. The county assessor cannot correct an error he made on the real estate book, after the book has been returned to the county court.
4. The county collector cannot alter or change the real estate tax book.

Very truly yours,

JOHN C. DANFORTH
Attorney General

Enclosure: No. 43, 3-3-39, Hunter
No. 10, 11-9-49, Bollinger
No. 15, 9-6-55, Caslavka
No. 70, 1-31-53, Peal
No. 13, 8-12-46, Bush

7M
August 20, 1968

OPINION NO. 202
Answered by letter-McFadden

Honorable C. John Forge, Jr.
Assistant Prosecuting Attorney
Jackson County Courthouse
Independence, Missouri

Dear Mr. Forge:

This is in response to your opinion request dated February 19, 1968, which concerned the proper use of the Uniform Traffic Ticket for purposes of prosecuting traffic offenders.

In State v. Allison, 424 S.W.2d 754, where a defendant had been convicted for operating an overweight truck, the Kansas City Court of Appeals held that there was no valid indictment or information filed in the case because the defendant had been tried on a Uniform Traffic Ticket which was signed by a peace officer only. The court concluded that since the prosecuting attorney did not sign the Uniform Traffic Ticket it did not become an information and the court had no jurisdiction.

The above decision confirms that the Uniform Traffic Ticket (Supreme Court Rule 37.46a) may still be used and will constitute an information when signed by the prosecuting attorney.

As for the matter of bail, when a magistrate court is not in session, Supreme Court Rule 37.485 authorizes any officer to take the person to the sheriff who shall set bail in accordance with the bail schedule as established by the magistrate having jurisdiction of the offense, but it shall not exceed \$200 nor be less than \$16. After bail has been posted, the individual shall be released on his recognizance that he will later appear in magistrate court to answer the charge.

Honorable C. John Forge, Jr.

Thus, an officer can issue a Uniform Traffic Ticket and may arrest if an offense is committed in his presence and may have the sheriff set bond if the magistrate is not in session at such time, and if no arrest is made by the officer, the individual receiving the Uniform Traffic Ticket is to appear in court and if he fails to so appear a warrant can be issued for him after the prosecuting attorney has signed the Uniform Traffic Ticket and made it an information.

Yours very truly,

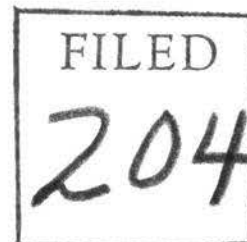
NORMAN H. ANDERSON
Attorney General

See Amendment to Ch. 105

May 9, 1968

OPINION NO. 204
Answered by letter-Mansur

Honorable Charles H. Dickey, Jr.
State Representative
Missouri House of Representatives
P. O. Box 22
Mexico, Missouri 65265



Dear Representative Dickey:

Recently you requested an opinion from this office concerning trustees of a county hospital as follows:

"1. Even though it has nothing to do with selecting the depositaries for county funds, does a county hospital's board of trustees in effect transact business with banks serving as depositaries of county funds, when the board of trustees decides to increase or diminish the amount of hospital money on deposit in the treasury of the county?

"2. Is a member of the board of trustees of a county hospital, who at the same time is a member of the board of directors of a bank serving as a depositary for county funds, entering into discussion and voting on questions of increasing financial charges and of increasing the average daily bank balance of the hospital involved in a conflict of public and private interests?

"3. Is a member of the board of trustees of a county hospital, who becomes a member of the board of directors of a bank serving as a depositary of county funds within thirty days after having entered into a discussion and voting on the question of increasing financial

Honorable Charles H. Dickey, Jr.

charges made by the hospital, involved in a conflict of public and private interests?"

We are enclosing herewith Opinion No. 85, issued by this office on January 30, 1968, to the Honorable Charles H. Sloan, Prosecuting Attorney, Ray County, holding that all funds belonging to a county hospital must be deposited with the county treasury under Section 205.190, RSMo Supp. We are also enclosing herewith Opinion No. 282, issued June 28, 1966, to the Honorable Elbert F. Turner, Prosecuting Attorney, Mountain Grove, Missouri, in which it was ruled that the term "transacting business" as used in connection with matters in conflict interests apply to transactions in which the officer or agency involved has the discretion or authority to transact such business. If the officer or agent does not have authority to do the act, he does not violate the statute when he does it because it would be beyond his official duties.

Section 205.190, RSMo Supp., provides that the county treasurer shall be the treasurer of the Board of Trustees of the county hospital and that he shall receive and pay out all monies belonging to the hospital as ordered by the Board of Trustees. It further provides that all monies received by the hospital shall be deposited in the county treasury to the credit of the hospital fund and paid out only upon warrants ordered drawn by the county court upon properly authenticated vouchers issued by the trustees.

The enclosed Opinion No. 85 summarizes the authorities and duties of the Director of the hospital in the management of the funds of the county hospital. All the funds of the hospital have to be turned over to the county treasury. The monies may be withdrawn only on a warrant ordered drawn by the county court upon properly authenticated vouchers of the hospital board for the expenses and operation of the hospital as provided in Section 205.190. The director has no authority to withdraw the funds for investment purposes. Certainly, if the payment of legitimate expenses in connection with the operation of the hospital results in a fluctuation in the hospital account with the county treasury it would not violate any provision of the statute. If the provisions of these statutes are complied with by the trustees of the hospital, we are unable to see how the conflict of interest statute could be violated.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

MM:maw

Enclosures: Op. No. 85
Sloan, 1-30-68 *Withdrawn*

Op. No. 282
Turner, 6-28-66 *Withdrawn*

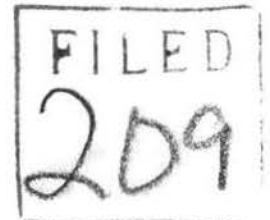
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WATCHMEN:
NIGHT WATCHMEN:
POLICE OFFICERS:
ARREST:
BOARD OF POLICE COMMISSIONERS:

It is the opinion of this office that a private watchman licensed by the Board of Police Commissioners of the City of St. Louis has authority limited by the terms of his license to serve and act as a private watchman at certain designated premises within the City of St. Louis only. Such a watchman is not an officer of a municipality in a first class county having a charter form of government and accordingly is not within the provisions of Sections 66.200, RSMo Supp. 1967, or 66.250, RSMo Supp. 1967, relating respectively to the transmission of municipal records and requiring municipal police officers to take training courses. Further, such a watchman has no authority to make an arrest in St. Louis County for a misdemeanor not committed in his presence.

Opinion No. 209-1968

December 17, 1968



Honorable Gene McNary
Prosecuting Attorney
St. Louis County Courthouse
Clayton, Missouri 63105

Dear Mr. McNary:

This is in response to your opinion request concerning whether or not a watchman licensed by the City of St. Louis is authorized to make a lawful arrest in St. Louis County; and if so, whether he must comply with the police training statute, Section 66.250, RSMo Supp. 1967, or the municipal records statute, Section 66.200, RSMo Supp. 1967. Your question finally asks whether or not such a watchman can make an arrest in St. Louis County for a misdemeanor not committed in his presence.

Under Section 84.340, RSMo 1959, the Board of Police Commissioners of the City of St. Louis is given the power to regulate and license private watchmen. Section 84.340 states:

"Board of police - power to regulate private detectives, etc. (St. Louis).- The police commissioner of the said cities shall have power to regulate and license all private watchmen, private detectives and private policemen, serving or acting as such in said

Honorable Gene McNary

cities, and no person shall act as such private watchman, private detective or private policeman, in said cities without first having obtained the written license of the president or acting president of said police commissioners of the said cities, under pain of being guilty of a misdemeanor." (Emphasis added)

You also inquire concerning the application of Section 84.330, RSMo 1959, which states:

"Police force members are officers of state (St. Louis).- The members of the police force of the cities covered by Sections 84.010 to 84.340, organized and appointed by the police commissioners of said cities, are hereby declared to be officers of the said cities, under the charter and ordinances thereof, and also to be officers of the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said cities."

We have examined the Manual for Licensed Watchmen of the City of St. Louis, the oath taken by private watchmen in St. Louis, the application for licensing for such watchmen and the license issued to such watchmen by the St. Louis Board of Police Commissioners. Our examination leads us to the same conclusion as that reached in Frank v. Wabash R. Co., Mo. 295 SW 2d 16 (1956) and the subsequent case of Manson v. Wabash Railroad Co., 338 SW 2d 54 (1960), that it is not necessary for us to rule on the application of Section 84.330. That is, in Frank and Manson the court held that a policeman is the legal equivalent of a watchman at common law who possessed the power of arrest and that since "police power" is not synonymous with "police force" a city may supplement the police protection which it provides by authorizing, under appropriate regulations, private persons to perform some of its police functions.

Our inspection of the license issued to private watchmen by the Board of Police Commissioners of the City of St. Louis makes it clear that the authority of the private watchman is limited to those premises within the City of St. Louis indicated in the license. This is also clear from the manual for licensed watchmen of the City of St. Louis provided by the Board of Police Commissioners wherein under Rule 5.003 licensed private watchmen have authority

Honorable Gene McNary

to arrest in the locations and during the times specified in their license. Further, the authority of the Board of Police Commissioners of the City of St. Louis to license private watchmen is specifically delineated by Section 84.340 and, as such, the territorial jurisdiction is within the City of St. Louis. Similarly, the duties of the Board of Police Commissioners are limited to the boundaries of the city by the express provisions of Section 84.090, RSMo 1959. Within the framework of these laws it cannot be said that private watchmen licensed by the Board of Police Commissioners of the City of St. Louis have any authority whatsoever beyond the boundaries of said city.

Such private watchmen are not police officers within the meaning of Sections 66.200 or 66.250 since both sections refer specifically only to law enforcement officials of municipalities in first class counties having a charter form of government. The City of St. Louis, of course, does not fall in this category.

It naturally follows in answer to your last question that such a watchman has no authority to make an arrest in St. Louis County for a misdemeanor not committed in his presence.


CONCLUSION

It is the opinion of this office that a private watchman licensed by the Board of Police Commissioners of the City of St. Louis has authority limited by the terms of his license to serve and act as a private watchman at certain designated premises within the City of St. Louis only. Such a watchman is not an officer of a municipality in a first class county having a charter form of government and accordingly is not within the provisions of Sections 66.200, RSMo Supp. 1967, or 66.250, RSMo Supp. 1967, relating respectively to the transmission of municipal records and requiring municipal police officers to take training courses.

Further, such a watchman has no authority to make an arrest in St. Louis County for a misdemeanor not committed in his presence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

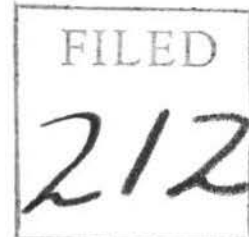
Yours very truly,



NORMAN H. ANDERSON
Attorney General

OPINION NO. 212
Answered by Letter--Peterson

March 14, 1968



Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Secretary:

Recently you asked this office for an official ballot Title for Senate Joint Resolution No. 1, 74th General Assembly, First Extra Session. Pursuant to the authority and direction of Section 125.030, RSMo 1959, the ballot Title for said Resolution shall be known as:

"Amend Article X of the Constitution by adding Section 4 (d) authorizing the General Assembly, when enacting income tax laws, to define income by reference to the laws of the United States and to make exceptions, additions and modifications to such United States laws; providing that the General Assembly shall set the tax rate."

Very truly yours,

NORMAN H. ANDERSON
Attorney General

WAP/jlf

SCHOOLS:
SCHOOL BOARDS:
NOMINATIONS:
ELECTIONS:
ST. LOUIS CITY
BOARD OF EDUCATION:

1. The sections of the Revised Statutes of Missouri which govern the procedure to be used in the handling of nomination petitions of persons who seek election to the Board of Education of the City of St. Louis as independent candidates are Sections 120.180 through 120.220, RSMo 1959, as amended. 2. The petitions are to be filed with the Board of Education for the St. Louis City School District.

OPINION NO. 213

March 28, 1968



Honorable James E. Godfrey, Speaker
Missouri House of Representatives
Capitol Building
Jefferson City, Missouri

Dear Mr. Speaker:

This opinion is written to consider two questions which you submitted as follows:

"1. What sections of the Revised Statutes of Missouri govern the procedure to be used in the handling of the nomination petitions of persons who seek election to the Board of Education of the City of St. Louis as independent candidates?

2. Further, which is the proper political subdivision with whom said nominating petitions are to be filed? Is the filing to be with the Election Board of the City of St. Louis or with the Board of Education itself, whose district is coterminous with that of the city?"

In considering your first question, the general provisions for boards of education in metropolitan school districts are found in Sections 162.571 through 162.661, RSMo Cum. Supp. 1967. Section 162.601 provides that ". . . all elections for members of the Board of Education shall be subject to and governed by the same laws, rules and regulations which govern elections in the city for municipal officers. . . ." However, members of the Board of Education are specifically excluded from the provisions for nominations in St. Louis City for municipal elections. Section 122.680, RSMo 1959. Thus the controlling sections are the general nomination provisions of Chapter 120, RSMo 1959.

Section 120.150, RSMo 1959, provides:

Honorable James E. Godfrey

" . . . candidates for the office of member of the board of education in school districts in cities having seven hundred thousand inhabitants or more shall be nominated in accordance with the provisions of sections 120.180 through 120.220 as amended, both inclusive, any provision hereof to the contrary notwithstanding."

Therefore, the sections which govern the handling of nomination petitions for independent candidates are Sections 120.180 through 120.220, RSMo 1959, as amended.

With regard to your second question, the controlling statute is Section 120.220, RSMo 1959, which provides:

" . . . petitions of nomination for nomination of candidates for the offices in cities and other political subdivisions shall be filed with the clerk or other proper officer or board of the political subdivision. . ."

This indicates that a distinction is to be made between candidates for offices in "cities" and candidates for offices in "other political subdivisions". This distinction governs the filing of the nomination petition since the petition is to be filed with the clerk or other proper officer or board of the political subdivision, depending upon the office sought.

A city is clearly a political subdivision of the state under the specific provisions of Section 120.220. A school district has also been held to be a political subdivision of the state. 78 C.J.S., Schools and School Districts, Section 24; State vs. Whittle, (Mo. 1933), 63 S.W. 2d 100, 102. These political subdivisions are separate entities as evidenced by the independent taxing power which is provided for them in the Missouri Constitution, Article X, Sections 11 (a) and 15.

The board of election commissioners is created for the city. Section 118.040, RSMo Cum. Supp. 1967. If a person desired to file for an office of the City of St. Louis, the nomination petitions and declarations of candidacy would have to be filed with the Board of Election Commissioners as provided in Sections 122.650 through 122.970, RSMo 1959. However, Section 122.680, as mentioned previously, excludes the nomination or election of members of boards of education from these provisions. Thus it is the opinion of this office that a candidate for election to the board of education of a

Honorable James E. Godfrey

school district is a candidate for office in "other political subdivisions" within Section 120.220 and, therefore, the filing of nomination petitions must be with the board of this political subdivision, i.e., the board of education.

This position is supported by the fact that requisite filings for nominations in urban school districts and certain six-director school districts are required to be with the respective boards of education. Sections 162.491, 162.492 and 162.271, RSMo Cum. Supp. 1967.


CONCLUSION

1. The sections of the Revised Statutes of Missouri which govern the procedure to be used in the handling of nomination petitions of persons who seek election to the Board of Education of the City of St. Louis as independent candidates are Sections 120.180 through 120.220, RSMo 1959, as amended.

2. The petitions are to be filed with the Board of Education for the St. Louis City School District.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

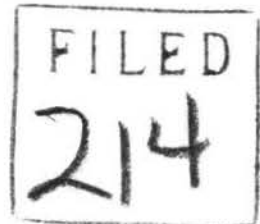

NORMAN H. ANDERSON
Attorney General

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FIRE PROTECTION DISTRICTS: COUNTIES OF FIRST CLASS: BOARD OF DIRECTORS: POWERS OF:	Section 321.220, RSMo Cum.Supp. 1967, granting certain powers to board of directors of fire protection district of first class county em- powers directors to require removal of obstructions in streets within district.
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OPINION NO. 214-1968

December 12, 1968



Honorable Jack J. Schramm
State Representative
District 37
7529 Gannon Avenue
University City, Missouri 63130

Dear Representative Schramm:

This office is in receipt of your request for a legal opinion of this office reading in part as follows:

"The Creve Coeur Fire Protection District is confronted with quite a problem on so-called private streets, although open to the public, in which obstructions in various forms are placed in such streets. Some of these obstructions are predominant humps. In attempting to maneuver these streets with our fire engines, the driver is confronted with quite a problem and, in the case of humps in the street, can cause injury to both the equipment and personnel. The Board of Directors would like to have an opinion from the Attorney General's office whether they have the power in the interest of safety and under their fire-fighting powers, to require removal of such obstructions in the streets within the Fire Protection District" (underscoring ours).

The question for which a legal opinion has been requested is found in the above quoted, underscored portion of your letter. We understand such inquiry to be whether or not the Board of Directors of the Creve Coeur Fire Protection District is authorized to require removal of obstructions in the streets from the Fire Protection District.

Honorable Jack J. Schramm

Apparently the obstructions in the streets referred to in the opinion request, as well as the Creve Coeur Fire Protection District are located within the first class county of St. Louis. Chapter 321, RSMo 1959, as amended, is in regard to fire protection districts in the four classes of Missouri counties. Sections 321.010 to 321.450 of said chapter, as amended, is applicable to fire protection districts of first class counties including the one referred to in the opinion request.

Section 321.220, RSMo Cum.Supp. 1967, gives the powers of a fire protection district of a first class county and reads in part as follows:

"For the purpose of providing fire protection to the property within the district, the district and, on its behalf, the board shall have the following powers, authority and privileges:

- (1) To have perpetual existence
- (2) To have and use a corporate seal
- (3) To sue and be sued, and to be a party to suits, actions and proceedings
- (4) To enter into contracts, franchises and agreements with any person, partnership, association or corporation, public or private, affecting the affairs of the district, including contracts with any municipality, district or state, or the United States of America, and any of their agencies, political subdivisions or instrumentalities, for the planning, development, construction, or operation of any public improvement or facility, or for a common service relating to the control or prevention of fires, including the installation, operation and maintenance of water supply distribution, fire hydrant and fire alarm systems; provided, that a notice shall be published for bids on all construction or purchase contracts for work or material or both, outside the authority contained in subdivision (9) below, involving an expense of two thousand dollars or more
- (5) Upon approval of the qualified electors, as herein provided, to borrow money and incur indebtedness * * *
- (6) To acquire, construct, purchase, maintain, dispose of and encumber real and

Honorable Jack J. Schramm

personal property, fire stations, fire protection and fire fighting apparatus and auxiliary equipment therefore, and any interest herein, including leases and easements.

(7) To refund any bonded indebtedness of the district without an election * * *

(8) To have the management, control and supervision of all the business and affairs of the district, and the construction, installation, operation and maintenance of the district improvements therein.

(9) To hire and retain agents, employees * * *

(10) To have and exercise the power of eminent domain and in the manner provided by law for the condemnation of private property for public use * * *

(11) To receive and accept by bequest gift or donation any kind of property

(12) To adopt and amend by laws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the Constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district, and refer to the proper authorities for prosecution for any infraction thereof detrimental to the district. Any person violating any such ordinance, rules and regulations is hereby declared to be guilty of a misdemeanor, and upon conviction shall be punished as is provided by law therefor.

(13) To pay all court costs and expenses connected with the first election or any subsequent election in the district

(14) To have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted herein. Such specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of Sections 321.010 to 321.450

(15) To provide for pensioning * * * "

Honorable Jack J. Schramm

In subdivision 12, Section 321.220, supra, a legislative grant of power has been given fire protection districts to adopt and amend by laws, fire protection and fire prevention ordinances, rules and other regulations necessary for carrying on the business, objects and affairs of the board of directors and of the district.

The importance and supremacy of the rules of the board of directors within the fire protection field has been passed upon by the appellate courts of Missouri. In this connection we call attention to the case of Wellston Fire Protection District vs. State Bank and Trust Company of Wellston, 282 SW 2d 171, in which the St. Louis Court of Appeals held that the Fire Protection Building Code promulgated by the Wellston Fire Protection District, prevailed over the Building Code of the City. At l.c. 176, the court said:

"After analysis of the fire protection district statute, the evident purpose thereof, the broad scope of the law, the vesting of police power in a district created pursuant thereto, and the state of confusion which could be precipitated if both the city and the district attempted to function in the same field, we hold that the Legislature intended to and did withdraw the authority from the city to regulate and control construction of buildings and other structures with respect to preventing and protecting against fires and lodged that authority in the district

* * *

"Our ruling herein simply means that the city has lost the right to regulate and control construction of buildings and structures within its limits for the purpose of preventing fires and protecting property and members of the public from the hazards thereof."

In view of the holding in the above cited case and of the broad rule-making powers granted to fire protection districts for the purposes mentioned in subdivision 12, Section 321.220, supra, it is believed the board of directors of the Creve Coeur Fire Protection District may, within their discretion, enact an ordinance requiring the removal of obstructions in the streets within the district, including all public streets and so-called private streets open to public use.

CONCLUSION

Therefore, it is the opinion of this office that Section

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321.220, RSMo Supp. 1967, granting certain powers to the board of directors of a fire protection district of a first class county empowers the board of directors of such district to enact an ordinance requiring the removal of obstructions in the streets within the district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

A handwritten signature in cursive script, reading "Norman H. Anderson".

NORMAN H. ANDERSON
Attorney General

LICENSES:
DRIVER'S LICENSE:
CHAUFFEUR'S LICENSE:

An employee of a manufacturing company who regularly drives a company owned pick-up truck, with tools and instruments, with tool chests mounted in the bed of the pick-up truck for performance of his various tasks, and who also carries replacement parts in the back of the pick-up, who makes the rounds of the various machines which he must inspect and service at least once a week regularly drives a commercial motor vehicle of another, that he is acting as a chauffeur as defined in the third definition of Section 302.010 (1), RSMo Supp. 1967, and may be prosecuted for a misdemeanor if he so operates such vehicle without having a proper chauffeur's license.

OPINION NO. 218

May 14, 1968

Honorable John P. Ryan
State Senator - District 8
Missouri Senate
7636 Lydia Street
Kansas City, Missouri 64131



Dear Senator Ryan:

We have your request for an official opinion of this office as follows:

"It has come to my attention that certain law enforcement officials, including the highway patrol, have taken a position which appears to me to be somewhat questionable with relation to interpretation of the chauffeur's license statutes of the State of Missouri. The pertinent sections to which I would direct your attention are Sections 302.101, sub-paragraph (1) defining the word 'chauffeur'; and sub-paragraph (3) defining the term 'commercial motor vehicle'.

The specific factual situation which I would like to have considered involves the operation of a pick-up truck by a full time employee of a large employer in Kansas City, Missouri. The employer is in the business of manufacturing numerous products for sale. The physical location of the production spots of the employer is such that to get from one part of the production plant to other parts of the production plant the motor vehicle involved must go over public streets. Thus, different products are produced in different places which requires the use of public roadways in order to get from one point to the other. The

Honorable John P. Ryan

production involved has several technical aspects and much of the operating equipment requires the regular attention of a highly trained technician to service, after regular inspection, the various pieces of machinery. In some instances the operators of the machinery are capable of performing the inspection and service and repair tasks, but with relation to other facets of the operation a skilled technician is necessary. This technician is furnished by the company with a company owned pick-up truck. He has the necessary tools and instruments in tool chests mounted in the bed of the pick-up truck for performance of his various tasks. He also carries replacement parts in the back of the pick-up truck so that he will not have to go back to the main parts center at the largest of his employer's plants. He makes the rounds of the various machines which he must inspect and service at least once a week.

On at least one occasion a highway patrolman has advised him he must have a chauffeur's license in order to continue the operation as described. This appears to be contrary to the intent of the law to the undersigned.

The employee obviously is not carrying passengers or property for hire, nor is he actually carrying freight or merchandise. He is carrying only equipment and parts belonging to his employer for use on other machinery belonging to the employer.

In light of several opinions cited in the pocket supplement of Vernon's Annotated Missouri Statutes, particularly opinion #227 (Burlison), dated August 5, 1964; and opinion #82 (Siefert) dated April 23, 1952; and opinion #88 (Tatum) dated July 6, 1953, it would appear that the interpretation should be that the described employee need not have a chauffeur's license."

Section 302.010, RSMo Supp. 1965, is as follows:

"Definitions. - When used in this chapter the following words and phrases mean:

Honorable John P. Ryan

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;

* * * * *

(3) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

You mentioned in your request, Opinion No. 82, April 23, 1952, to the Honorable William Siefert, Representative, copy of which is attached. We do not believe that this opinion is determinative of the request inasmuch as the conclusion therein in discussing Section 302.010, which was effective January 1, 1952, was as follows:

"It is therefore the opinion of this department that a contractor who uses his own motor truck to carry workers and their material to the place of the contract work does not need a chauffeur's license."

The party driving the vehicle in question in your request is not the owner of the vehicle but regularly operates a commercial motor vehicle of another person in the course of or incident to his employment.

The facts in Opinion No. 82 to Representative Siefert are as follows:

"The small trucks I have reference to are not for hire but only to carry workers and their material to their place of work, for example, a painting contractor driving his own truck."

You mentioned the opinion of October 14, 1953, to the Honorable Stewart E. Tatum, copy of which is attached, which is not applicable to your request, supra, for an opinion of this office, such opinion dealing with motor emergency vehicles and privately owned cars of the Sheriff of Jasper County. The

Honorable John P. Ryan

opinion deals with the Section 304.420, 1949 Mo. R. S., 304.022, R. S. Mo. 1949, subsection 3 and 4, and since the vehicles mentioned in your request are not emergency vehicles, this opinion has no relevancy to your request.

You mentioned Opinion No. 227, dated August 5, 1964, to the Honorable Bill D. Burlison, copy of which is attached hereto, in which a request for requirement of Chauffeur's Licenses under Section 302.010, RSMo 1959, is made.

The factual statement in such opinion request, (Burlison), states,

"'A local sheet metal heating and air-conditioning contractor hires from twelve to sixteen men and has one or two pickup trucks. Occasionally if a particular part or piece of material will be needed while this crew is working on a job, one of the sheet metal workers who is most expendable at the time will drive the pickup truck. . . ." (Emphasis added).

Under the facts of the situation you have set out, the employee mentioned in your request operates regularly a motor vehicle belonging to his employer, carrying his employer's property for repairs and maintenance and as you factually state he regularly operates the vehicle as an incident of his employment, but whose principal occupation is not the operating of such motor vehicle. This same opinion, (Opinion No. 227, August 5, 1964, Burlison), page 2 states,

"A slightly different set of facts may indicate that the workers are more than infrequent drivers on occasional trips or that the duty is assigned or sufficiently fixed that compensation is paid for the service of driving as part of the total employee's duties and a license would be required."

The conclusion of this opinion held that sheet metal workers who infrequently use their owner's truck to pick up new parts or materials, being the worker who can most easily be spared from the job, at the time be designated to make such trip are not required to have a "chauffeurs' license" in order to

Honorable John P. Ryan

operate such trucks. We are of the opinion there is a factual difference in your request, and that the opinion is not determinative of your request.

A chauffeur is defined in paragraph (1) of Section 302.010, RSMo Supp., 1967, as:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such services in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicles;"

A commercial motor vehicle is defined in paragraph (3) of the foregoing section as:

"(3) 'Commercial motor vehicle', a motor vehicle designed or regularly used for carrying freight and merchandise, or more than eight passengers;"

Section 302.010 (1), supra, provides three definitions, each containing a different criteria for determining whether the operator of a motor vehicle should be classified as a chauffeur. These classifications are separate and distinct and an operator may be classed as chauffeur if he qualifies under any one of them.

Section 302.020 (1), RSMo Supp. 1967, is as follows:

"--1. It shall be unlawful for any person, except those expressly exempted by section 302.080, to:

(1) Operate, as a chauffeur, any vehicle upon any highway in this state unless he has a valid license as a chauffeur under the provisions of this chapter;"

Honorable John P. Ryan

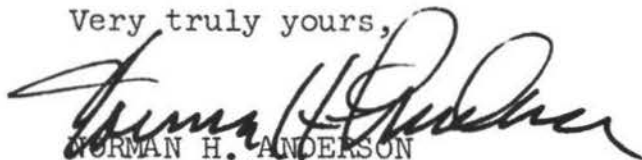
We believe that under the factual situation you have presented that the person as set out in your request, is operating a commercial motor vehicle, is a chauffeur; and he may be prosecuted for a misdemeanor, within the purview of said sections supra.

CONCLUSION

The opinion of this office is that an employee of a manufacturing company who regularly drives a company owned pick-up truck, with tools and instruments, with tool chests mounted in the bed of the pick-up truck for performance of his various tasks, and who also carries replacement parts in the back of the pick-up, who makes the rounds of the various machines which he must inspect and service at least once a week regularly drives a commercial motor vehicle of another, that he is acting as a chauffeur as defined in the third definition of Section 302.010 (1), RSMo Supp. 1967, and may be prosecuted for a misdemeanor if he so operates such vehicle without having a proper chauffeur's license.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Arnold Brannock.

Very truly yours,

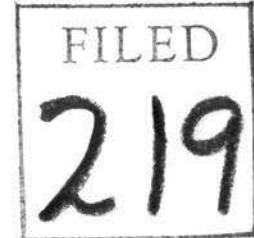

NORMAN H. ANDERSON
Attorney General

Enclosures: Op. 82 - 4-23-52 - Siefert
Op. 88 -10-14-53 - Tatum
Op.227 - 8-5- 64 - Burlison

SCHOOLS: The names of candidates in an election "in any six-
ELECTIONS: director school district located wholly within a city
having a population of more than two hundred thousand
and less than seven hundred thousand" shall be listed
on voting machines in the order that is prescribed by
the appropriate board of election commissioners and that said board
may use its discretion in determining what that order shall be.

OPINION NO. 219

March 15, 1968



Honorable Donald L. Manford
State Representative--18th District
9409 Oakland
Kansas City, Missouri 64138

Dear Representative Manford:

This is in answer to your letter of March 6, 1968, in which
you said:

"I am writing to request an opinion concerning the placement of names of candidates in six director school district elections. A question has arisen as to whether the names of candidates can be placed on the ballot in the voting machine in alphabetical order or whether said names must be placed in the order of the filing time. It would appear that some consideration would be given under Sec. 162.351 and Sec. 121.100."

Subsequently, in a telephone conversation you stated that the district in question is located in Jackson County wholly within the City of Kansas City, Missouri. You also stated that the voting machines to be used were those of Kansas City.

Section 162.351, RSMo Cum. Supp. 1967, states:

"In any urban school district in a city having a population of more than three hundred thousand or in any six-director school district located wholly within a city having a population of more than two hundred thousand and less than seven hundred thousand, or in any six-director school district in a county having a population of more than seven hundred thousand the boards of election commissioners of the city or county or both in which the

Honorable Donald L. Manford

district is located shall conduct any or
all school elections held in the district.
* * * " (Emphasis added)

The foregoing section applies to our case since we have a six-director school election in a district which is located wholly within a city which has a population figure between two hundred thousand and seven hundred thousand. (In the 1960 census, Kansas City had a population of 475,539.) The responsibility for conducting the election, therefore, would seem to be in the hands of the Kansas City Board of Election Commissioners.

Since voting machines will be used in this election, we will look at the provisions of Chapter 121 which govern voting machines. Section 121.260, RSMo 1959, speaks of the manner in which the voting machine law shall be applied:

"1. The provisions of all state laws relating to elections and of any city charter or ordinance not inconsistent with this chapter shall apply to all elections in districts or precincts where voting machines are used.

2. Any provision of law, or of any city charter, or ordinance, which conflicts with the use of voting machines set forth in this chapter, shall not apply to the districts, wards, or precincts in which voting machines are used. All acts, or parts of acts, or city charters, or ordinances, in conflict with any of the provisions of this chapter, are of no force or effect in election districts, wards or precincts where voting machines are used."

From the foregoing section, it is clear that where the voting machine law is applicable to a situation, it is dispositive and controlling. Section 121.100, RSMo Cum. Supp. 1967, states:

"1. In every county or city adopting the use of voting machines, the election authority shall furnish to the judges of election of the precincts in which the machines are to be used a sufficient number of ballot labels printed in uniform size in black ink and on clear white material, of such form and size as will

Honorable Donald L. Manford

fit the ballot frames of the machines.
The arrangement of the names of the candi-
dates on the ballot labels shall be pre-
scribed by the officials. * * *

* * * * *

4. The order of the arrangement of parties and candidates shall be as provided by law, not in conflict herewith, except that the candidates for nomination for any one office at any primary election shall be listed in the order of filing, either vertically or horizontally. * * * " (Emphasis added)

A former opinion of this office, Attorney General's Opinion No. 21, Dalton, 12/20/61, interpreted the portions of Section 121.100 set out above. It was held that subsection 1 applied to general elections and that in those elections the election officials are given broad and unlimited discretion in arranging the names of candidates on the ballot labels. This was further interpreted to mean that the names did not have to be printed in the order certified by the Secretary of State as required by Section 111.420, RSMo 1959. However, the former opinion held that under subsection 4, as set out above, the names of candidates in primary elections had to be listed in the order of filing.

It should be noted that Section 121.100, paragraphs 1 and 4, were amended in 1965. However, it is our belief that the amendment did not change that part of the statute relating to our present question which was interpreted in the above mentioned opinion.

Again we refer to Section 162.351 which states:

" * * * When any school election is held it shall be conducted in all respects in accordance with the laws relating to election of state, county or city officers, including the laws governing the eligibility and registration of voters, and to the applicable law relating to the submission of bond issues within the jurisdiction of the board of election commissioners which conducts the election. * * *"
(Emphasis added)

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We feel that this part of Section 162.351¹ contemplates that the school director elections be held in accordance with the law governing general elections. If this is true, then paragraph 1 of Section 121.100 would apply and the order of the listing of the candidates' names would be left to the discretion of the appropriate election officials, which in this case would be the Board of Election Commissioners.

CONCLUSION

It is the opinion of this office that the names of candidates in an election "in any six-director school district located wholly within a city having a population of more than two hundred thousand and less than seven hundred thousand" shall be listed on voting machines in the order that is prescribed by the appropriate board of election commissioners and that said board may use its discretion in determining what that order shall be.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

CGS/jlf

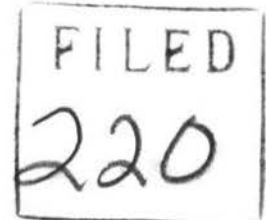
ST. LOUIS CITY CIRCUIT COURT:
JURY COMMISSIONER:
SHERIFF:
JURY ASSEMBLY ROOM:
DUTIES OF JURY COMMISSIONER
AND SHERIFF REGARDING JURY
ASSEMBLY ROOM:

The Circuit Court of the City of St. Louis may not lawfully transfer the jurisdiction, custody and operation of the jury assembly room in the Civil Courts Building in the City of St. Louis from the sheriff to the jury commissioner of said City.

Opinion No. 220-68

May 10, 1968

Honorable Richard J. Rabbitt
Missouri House of Representatives
68th District
4340 Forest Park
St. Louis, Missouri 63108



Dear Representative Rabbitt:

This is in answer to your request for an opinion which was stated as follows:

"Does the Circuit Court of the City of St. Louis en banc have the lawful power to make a rule which transfers the jurisdiction, custody and operation of the jury assembly room in the Civil Courts Building in the City of St. Louis from the sheriff of said City to the jury commissioner of said City?"

The provisions of the Missouri statutes which deal with juries are found in Title XXXIV and include Chapters 494 through 499. Chapter 498, RSMo. 1959 is specifically applicable to the City of St. Louis. There is no statute designating either the jury commissioner or the sheriff as being in charge of the assembly room, nor are there any sections within Chapter 498 which specifically provide for the jury assembly room which is in question; thus it is necessary for us to determine the intention of the legislature and the powers of the court and jurisdiction of the sheriff under applicable law.

In reviewing the history of our jury system, we must start back in 1855 when there was one statute for all counties. At that time the only pertinent provision was that the courts were to order the sheriff to summon a panel of jurors. In 1857 there was an act to provide a jury system for St. Louis County. L. 1856-57

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p. 661. This act created the jury commissioner and provided that the sheriff should summons those people whose name was furnished by the jury commissioner. In 1879 at the time when St. Louis City was recognized as separate from St. Louis County, there was an act which provided for a jury system in cities having over 100,000 inhabitants (St. Louis). This system was much like that provided for St. Louis County in 1857. In 1931 there was an act which added jury supervisors to the system and except for minor changes, this act of 1931 (L. 1931 p. 243) is the same as our present Chapter 498 which applies to St. Louis City. The Board of Jury Supervisors consists of the Circuit Court en banc plus the circuit clerk (498.010 RSMo. Supp. 1967).

During this time when the jury system for St. Louis was developing, there were also systems developed for the courts in other categories of counties, which are now Chapters 495, 496 and 497. Starting again from the basic provision for all counties in 1855 there was a similar development in all three of these categories. In 1905 there was an act (L. 1905 p. 174) which provided that there was to be a general panel of jurors to be placed in the charge of the sheriff and the divisions of the court were to get their jurors from this panel. The act was applicable to Jackson County and is presently found in Section 497.160, RSMo. Cum. Supp. 1967. In 1911 (L. 1911 p. 305) there was a similar act which is now found in Sections 495.090 and 495.100. In 1933 (L. 1933 p. 277) there was another act having the same provisions which is now Section 496.060. Thus for juries in counties with population of 60,000 to 800,000, the legislature has made specific provisions for the assembly of jurors before assignment to the divisions, much like the St. Louis City Jury Assembly Room. To be emphasized is that in each instance when the legislature undertook to write a statute to provide for the assembly of prospective jurors, they specifically provided that this general panel of jurors was to be placed in charge of the sheriff.

With regard to St. Louis City, it has not been necessary for the legislature to specifically provide for the general panel of jurors to be assembled in charge of the sheriff, since the Circuit Court of St. Louis has operated in this manner by their own motion. If the legislature were to act now and make a similar provision for St. Louis City (Chapter 498) it could be considered an indication that what has been done prior to this was unauthorized.

It is a general rule that public officers have only such power and authority as are clearly conferred by law or necessarily implied from the powers granted. 67 C.J.S., Officers, Section 102, p. 366. And, a power not expressly granted by statute is implied only where it is so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. 82 C.J.S., Statutes,

Honorable Richard J. Rabbitt

Section 327, p. 634. Bearing these principles in mind, what are the duties imposed upon the jury commissioner by law?

A brief look at the history leading to the creation of jury commissioners is found in Eckrich vs. St. Louis Transit Co., (Mo. 1903) 75 S.W. 755, 759. In summary this illustrates that originally the sheriff was responsible for both the selection and the summons of the jury, but that in 1879 the duty of jury selection was placed upon the newly created jury commissioner. Since that time an elaborate system has been adopted for the selection of jurors as found in Sections 498.110 through 498.200. The purposes behind this history of legislation are set out in State vs. McGoldrick (Mo. 1951) 236 S.W.2d 306, 307 as follows:

"* * * 'the object being as far as possible to procure a fair and impartial jury and to obviate the possibility of packing juries or selecting them with reference to particular cases, and also to equalize the burden of serving on juries among all persons qualified therefor.'"

The federal district court for the District of Columbia in a case concerning the federal courts' counterpart to the jury commissioner said:

"The very purpose of establishing a jury commission is to create an impartial body standing, so to speak, between the court and the public, to obtain on an individual basis suitable persons to serve on juries."
United States vs. Ware, (1964) 237 F. Supp. 849, 851.

Thus the spirit of the legislation with regard to jury commissioners seems to be to insure a fair and impartial selection of jurors.

The jury assembly room, which is in question in this opinion, has no function until after the jury commissioner has made his selection from the jury wheel and the sheriff has issued a summons as provided in Section 498.160. This room is used as a gathering place for the jurors when they report for duty and the only selecting which goes on is the assignment of the jurors to the various divisions of the Circuit Court. Section 498.210, RSMo. 1959 purports to deal with the furnishing and assignment of jurors to certain courts, and states as follows:

"The jury commissioner of the City of St. Louis, Missouri, shall, in the manner pre-

Honorable Richard J. Rabbitt

scribed by the laws and by the rules of the Circuit Court of the City of St. Louis furnish the Court from the jury list, the names of such number of jurors as may be ordered by said court; * * * "

This statute expressly states that the jury commissioner shall furnish names of jurors from the jury list and the only discretion given to the court is the manner in which these names are to be furnished. There is no provision in Chapter 498 which gives the jury commissioner any semblance of control over the jurors after they have been summoned. It does not appear essential to the jury commissioner's power of selection that he have control of the jury assembly room, since this room has no function until after the selection is finally made.

Regarding the Circuit Court's power in this matter, the court en banc under the statute is in effect the board of supervisors exercising directive control over the jury commissioner, with the addition of the circuit clerk (Section 498.010, supra.). Also, in 1866 there was an act (L. 1866 p. 73) made applicable to the St. Louis Circuit Court which provided:

"And in addition to the ordinary power of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein. . . ."
(underscoring added)

The underlined portion of the above quote apparently (from early case law) was referring to the fact that the court had several divisions. This same provision is now found in Section 478.397, RSMo. 1959. It would seem that this provision in absence of any qualifying statutes is sufficient to give the St. Louis Circuit Court the power to make the rules concerning the assembly of their jurors.

However, it is a fundamental principle that the courts have no power to make law, but only to declare the law as it is, construe it and enforce it. 16 Am. Jur. 2d, Constitutional Law, Section 225, p. 471. Thus, even if we assume that the Circuit Court has the general power to designate who is to have jurisdiction over the jury assembly room, we are still faced with the fact that legislation on this subject, its history and the duties imposed on the St. Louis Jury Commissioner by statute, all not only do not provide that the Commissioner be physically in charge of the jurors or their place of assembly, but also indicate strong intention that it is to be left in the hands of the sheriff as one

Honorable Richard J. Rabbitt

of his long-standing areas of responsibility.

Regarding the sheriff's traditional duties as to juries and jurors, in St. Louis as elsewhere, cases construing provisions of what is now Section 57.090, RSMo. 1959, general provisions as to sheriffs requiring attendance at court and furnishing them supplies, recognized sheriffs as responsible for keeping and boarding jurors when necessary even though no provision had yet been made for payment of such costs (Person v. Ozark County (1884) 82 Mo. 491, State v. Smith (1878) 5 MA 427). In like manner, Section 550.020, RSMo. 1959, places sheriffs "in charge" of the jury in felony cases, including the supplying of "board and lodging". In all cases, the sheriff of course is the official who summons a jury, including alternate or additional jurors if the panel is exhausted, and takes an oath to so perform these duties (Sections 494.060 and 494.070, RSMo. 1959); and "a trial court has authority to [so] order the sheriff" (emphasis added; see State v. Hamilton (Mo. Sup. 1937) 102 S.W.2d 642, 648).

In summary, no statute specifically provides for a designated person to be in charge of the jury assembly room in the City of St. Louis; and while the Circuit Court there has general rule-making power by statute, common law precedent generally places the sheriff in charge of jurors and their needs. Furthermore, the study of jury commissioner legislation set out herein indicates that the legislature did not intend to place the jury commissioner physically in charge of the jurors or their place of meeting but that these functions should remain with the sheriff, who now performs them.

CONCLUSION

Therefore, it is the opinion of this office that the Circuit Court of the City of St. Louis may not lawfully transfer the jurisdiction, custody and operation of the jury assembly room in the Civil Courts Building in the City of St. Louis from the sheriff to the Jury Commissioner of said City.

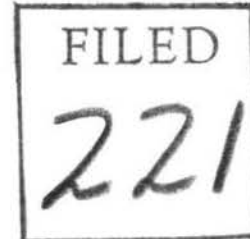
The foregoing opinion, which I hereby approve, was prepared by my assistant, William L. Culver.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

May 9, 1968



Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County Courthouse
Rock Port, Missouri 64482

Dear Mr. Gorman:

This office is in receipt of your request for a legal opinion as to the amount a sheriff of a third class county is to be paid for transporting prisoners to the State Penitentiary.

Section 57.290, RSMo 1959, provides certain fees shall be allowed sheriffs and other officers in criminal cases. Said section is applicable to sheriffs of third class counties and reads in part as follows:

"3. For the services of taking convicts to the penitentiary, the sheriff, county marshall or other officers shall receive * * * seven cents per mile for the distance necessarily travelled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually travelled route from the place of departure to the penitentiary; the sum of seven cents per mile travelled, while being taken to the penitentiary, shall be allowed the sheriff to cover all expenses of each convict while being taken to the penitentiary * * *"

Section 57.410, RSMo 1959, requires a sheriff of a third or fourth class county, for and on behalf of the county to charge and collect every fee accruing to his office arising out of his duties in connection with the investigation, arrest,

Honorable Bernard W. Gorman
Page 2

prosecution, commitment and transportation of persons accused of or convicted of criminal offenses, except criminal fees chargeable to the county. The sheriff may retain all fees collected by him in civil matters. Mileage charges authorized by Section 57.290 supra, are criminal fees and when collected by the sheriff, must be paid over to the county treasurer.

In an opinion of this office written for Honorable Emory L. Melton, Prosecuting Attorney of Barry County, on February 28, 1947, it was concluded the sheriff and his deputy (if the court appoints a deputy) are entitled to their actual travel expense not to exceed five cents per mile for taking prisoners to the penitentiary. Section 13547.305, Laws of 1945, was cited as authority for such mileage. Said section is basically the same as Section 57.430, RSMo Cum. Supp. 1967, except that in the latter section the rate of mileage has been increased to not exceeding ten cents per mile. Section 57.430, RSMo Cum. Supp. 1967, reads in part as follows:

"In addition to the salary provided in Sections 57.390 and 57.400 the county court shall allow the sheriffs and their deputies payable at the end of each month out of the county treasury, actual and necessary expenses for each mile travelled in serving warrants or any other criminal process not to exceed ten cents per mile and actual expenses not to exceed ten cents per mile for each mile travelled, the maximum amount allowable to be two hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense* * *"

In the above mentioned opinion of this office, (copy enclosed) it was pointed out that it was believed the taking of a prisoner to the penitentiary would come under the provision (of Section 13547.305, Laws of 1945) for serving other criminal process, for at the time a prisoner is delivered to the penitentiary by the sheriff a commitment is served upon the warden, and a commitment is a criminal process issued by the trial court. In that event, the sheriff or his deputies would be entitled to the actual expense of not to exceed five cents per mile, which mileage is to cover all expenses of the trip.

For the same reasons given in the opinion mentioned above, it is believed that a commitment which the sheriff of a third class county has, and must serve upon the warden of the State Penitentiary, when the sheriff delivers one or more convicts to the penitentiary, is a criminal process within the meaning of Section 57.430 Supra, and the county court of such a third class

Honorable Bernard W. Gorman
Page 3

county shall allow the sheriff actual and necessary expense for each mile of his trip in taking one or more convicts to the penitentiary, and in serving the commitment for them, at not to exceed ten cents per mile travelled by the sheriff.

Therefore, it is our view that under provisions of Section 57.430 RSMo Cum. Supp. 1967, the county court shall allow the sheriff of a third class county actual and necessary expenses for each mile travelled in taking convicts to the penitentiary at a rate of not to exceed ten cents per mile.

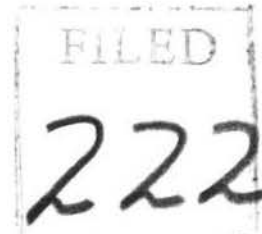
Yours very truly,

NORMAN H. ANDERSON
Attorney General

PNC:vt

Enc. Opinion to
Honorable Emory L. Melton

March 25, 1968



Mr. Donald J. Gralike
State Representative District 49
646 Buckley Road
St. Louis, Missouri 63125

Dear Representative Gralike:

We acknowledge your recent letter in which you inquire as to application of the new law requiring in person filing of declarations of candidacy in the situation of a prospective State Representative now serving with the Armed Forces in Vietnam.

House Bill No. 21 of the 74th General Assembly (§120.345, RSMo 1959) requires a candidate for circuit judge, state senator, or state representative to file his declaration of candidacy in person with the Secretary of State. However, subsection 2 of the law permits physically disabled persons, and persons on active duty with the Armed Forces of the United States to file their declaration via registered mail when accompanied by an appropriate affidavit.

For your convenience, and perhaps that of a constituent, we are enclosing herewith a copy of House Bill No. 21 in its final form.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Enclosure

LRW/ms

OPINION NO. 224
Answer by Letter (Ashby)

August 20, 1968



Honorable Maurice B. Graham
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645

Dear Mr. Graham:

This letter responds to your inquiry whether the county court and the hospital board of trustees are authorized or have power to purchase land which is adjacent immediately to the hospital site and the, (a) lease the land at nominal cost to a private not-for-profit corporation for the purpose of building a medical facility to provide office space for physicians; or (b) build a building and provide office space for physicians, the physicians to pay nominal rent to the county for use of such office space; or (c) lease the land to a group of two or more physicians for a nominal rental, the group to then build a facility to provide office space for the physicians.

The Madison County Hospital is a public hospital organized under Section 205.160, RSMo 1959, and is supported by funds derived from taxes imposed upon the public for the purpose. Section 25, Article VI, of the Missouri Constitution, provides as follows:

"No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) * * *."

You state in your letter that the sole purpose of this project is to furnish office space in order to attract physicians

Honorable Maurice B. Graham
Opinion No. 224 - 1968

to come to your community. While we do not quarrel with your purpose, we advise that such an expenditure would violate Section 25, Article VI, of the Missouri Constitution, which we have set out above.

For the reasons above, we must conclude that the questions you submitted by your letter which have for their purpose the sole object of furnishing and building a building for the purpose of furnishing office space to private physicians and thereby attract physicians to your community, would be in violation of Section 25, Article VI, of the Missouri Constitution. We regret that our answer is not more favorable to this very worthwhile project. However, as you pose the problem to us, we must reply in the negative.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

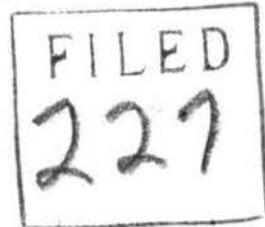
RIGHTS OF CITIZENSHIP:
FEDERAL DISCHARGE OF
PRISONERS:
PROBATION, PARDON,
AND PAROLES:

Section 549.111, RSMo Cum. Supp., 1967
does not include within its purview a
person who has received his final dis-
charge under federal law.

OPINION NO. 227

August 2, 1968

Honorable Edward T. Linehan
State Senator - 6th District
Missouri Senate
Suite 1437, Boatmen's Bank Building
314 North Broadway
St. Louis, Missouri 63102



Dear Senator Linehan:

This opinion is written in response to your question as to whether or not it would be a fair interpretation that Section 549.-170 would also include within its purview a person who has received his final discharge under federal law.

Section 549.170 has been repealed by Laws 1963, p. 671, section 2. However, the provisions of that statute have been incorporated into Section 549.111 (2), RSMo Cum. Supp., 1967. Therefore, I will consider your request for an opinion to be stated as follows:

"Is it a fair interpretation that Section 549.111 includes within its purview a person who has received his final discharge under federal law?"

The pertinent portion of Section 549.111 provides:

"2. Any defendant who receives his final discharge under sections 549.058 to 549.-161 shall be restored all the rights and privileges of citizenship." (emphasis added)

Honorable Edward T. Linehan

It is a general rule of statute construction that, "where no exceptions are made to the general language of the statute, it will be presumed that no exceptions were intended," 82 C.J.S., Statutes, Section 316, p. 553.

Section 549.111 (2) was specific in stating that restoration of citizenship rights and privileges was limited to final discharges received under Sections 549.058 to 549.161, with no exceptions made for any type of discharge under the federal parole and probation rules.

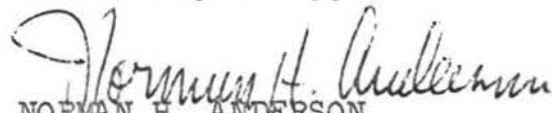
Section 549.061 enumerates the courts and boards which have power to place convicted persons on parole or probation and it also makes no mention of any federal court or board.

CONCLUSION

Therefore, it is the opinion of this office that Section 549.-111, RSMo Cum. Supp., 1967 does not include within its purview a person who has received his final discharge under federal law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Dorr.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

August 30, 1968

Honorable Hunter Phillips, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri 65101

Dear Mr. Phillips:

You have requested our opinion as to the reason certain real property owned by the St. Louis Mercantile Library Association in downtown St. Louis is exempt from ad valorem taxation. The specific property is Lot 42 in City Block 117, improved with a six story building. Only the upper two floors of the building house the library facilities of the Association, the remaining four stories and basement being occupied under lease by a large commercial bank.

The short answer to your question is that on March 3, 1953, the Circuit Court of the City of St. Louis entered a final judgment, the effect of which was to declare the property in question wholly exempt from taxation by the State of Missouri or any subdivision or authority thereof so long as the property is owned by the Association and it continues to occupy and use the property or any part thereof as a public library. Included in the judgment was an injunction restraining the assessor and his successors in office from thereafter assessing any taxes against the property while it is so tax exempt. This judgment, entered in Cause No. 51419-D, styled "St. Louis Mercantile Library Association, a corporation, plaintiff, vs. Joseph P. Sestric, as Assessor of the City of St. Louis, Missouri and Del L. Bannister, as Collector of the Revenue of the City of St. Louis, Missouri, defendants," was not appealed and is still in full force and effect.

The Court stated in part in its "Conclusions of Law:"

"1. The parcel of land and building thereon at the southwest corner of Broadway and Locust Street,

known as Lot 42 in City Block 117 of the City of St. Louis, Missouri, and owned by plaintiff, was and is wholly exempt from taxation for State, School, City and other general taxes for the years 1950 and 1951, and such property will continue to be exempt from such taxes for subsequent years so long as said property is owned by plaintiff and so long as plaintiff continues, as heretofore, to occupy and use the said land and building or any part thereof as a public library."

The Judgment and Decree provided in part (5) as follows:

"5. That the defendant, Joseph P. Sestric, as Assessor of the City of St. Louis, Missouri, and his deputies, agents, employees and servants, and his and their successors in office, be forever enjoined and restrained from hereafter assessing any taxes against the aforesaid property of plaintiff, so long as the same shall be owned by plaintiff and occupied and used by it in whole or in part, as heretofore, as a public library;"

Implicit in your inquiry is the question whether the March 3, 1953 Judgment precludes any further attempt to tax the property in question. As to this, we can give no definitive answer, although for reasons which follow, it is our view that *res judicata* and estoppel by judgment might be held applicable in the absence of legislative action.

There are several decisions of our Supreme Court holding that "In tax cases each year's tax is a separate transaction and each action relating to each year's tax is a new cause of action." An example is *In re Breuer's Income Tax* (Division 1) 354 Mo. 578, 190 S.W.2d 248. However, most of the cases so holding involve evidentiary determinations of value (e.g., *Cupples-Hesse Corporation v. Bannister*, Mo., 322 S.W.2d 817), and even *Young Men's Christian Ass'n v. Sestric* (en banc), 362 Mo. 551, 242 S.W.2d 497, which adjudicated the tax exempt status of YMCA property, involved an evidentiary determination relating to the use made of the property. And we believe it of importance that in the YMCA case, it was the taxpayer which was relieved of the conclusive effect of a prior decision on the ground it should be treated in the same manner as other charitable institutions similarly situated.

The YMCA case conceded that ordinarily "*res judicata* and collateral estoppel, or estoppel by judgment, apply to tax cases as well as to other litigation, *State ex rel Blair v.*

Center Creek Mining Company, 260 Mo. 490, 171 S.W. 356." The Center Creek Case was decided on the basic premise that in the absence of constitutional or legislative declarations to the contrary, the state is bound by the doctrine of res judicata and estopped by judgment in tax cases. It did not involve the issue of exemption from taxation. However, the two Missouri cases cited by the Court in support of its basic premise are directly in point on this issue.

The first of these cases, Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S.W. 979, involved, as here, the binding effect of a circuit court judgment. The Circuit Court of Jackson County had, in two cases, adjudged that the plaintiff was exempt from taxation on the property in question for certain years. Noting that in the latest action, the parties were the same, the property was the same and the facts were the same, only the tax year being different, the Court ruled as follows, l.c. 984:

"In view of the fact that the exemption of the leasehold was the question at issue in both of the former suits by injunction, and that there had been, at the time this suit was brought, no change either in the law or the facts, and the court having decreed in favor of the exemption, in our opinion the weight of authority and reason is that the judgment on that exemption became a finality, although in our opinion it was incorrectly so decided." (Emphasis Added)

The other case, North St. Louis Gymnastic Society v. Hagerman, 232 Mo. 693, 135 S.W. 42, held on the authority of the Exposition Driving Park Case, that since "(t)he identical claim of exemption, under the same charter provision" was made in the prior case, the defense of res judicata was applicable, even though the earlier case may well have been erroneously decided. As against the argument, supported by a line of cases in other jurisdictions, "that the exercise of the right to tax belongs to a sovereignty, and that estoppel does not lie against a sovereign," the Court said, S.W., l.c. 46:

"To our minds the matter was so exhaustively considered and so soundly reasoned in the Exposition Driving Park Case that no judicial excuse exists for a re-examination of its doctrine."

Thus, in the only cases directly in point, it has been squarely decided by the Missouri Supreme Court that an adjudication made by a court of competent jurisdiction (including circuit courts) that certain property is exempt from taxation, is conclusive against the taxing authorities where the basic facts are the same, no matter how erroneous may have been the

former adjudication. And in the Gymnastic Society Case, the Court expressly ruled that the successors in office of the tax collectors and assessors are equally bound, as privies.

Two more recent decisions of the Court have cast some doubt on the extent to which the doctrine of res judicata and estoppel by judgment would now be applied, in re Greuer's Income Tax Supra, and Young Men's Christian Association v. Sestric, Supra. The force of the Breuer Case is weakened by the fact that it did not clearly appear that the former judgment was based on the issue of nontax bility, there being another independent basis therefor. However, after so noting, the Court then held that since the question presented was one of law on the meaning of income in our income tax law (a question of general application), the determination in the former action was not conclusive, since injustice would result.

The Court held at l.c. 250:

"It would give one taxpayer an unfair advantage over others, and be unjustly discriminatory, if through inefficiency or neglect of the collecting officers, to appeal an erroneous decision on a question of law, it should be held that he would be relieved for all time from paying taxes all others must pay."

In the YMCA Case, the Court en banc applied the principle of the Income Tax Case in favor of the taxpayer, its theory being that injustice would result if the YMCA continued to be taxed because of an erroneous decision which had been rejected when attempted to be applied to other charitable organizations similarly situated.

The questions of law decisive of the tax exempt status of the Association's property do not involve the interpretation of a tax law of general application, as in the Breuer Tax Case, or the interpretations of the constitution and statute containing general provisions governing exemption from taxation of property used for charitable purposes, as in the YMCA Case. The particular factual situation here involved is unlikely to recur, so that even if the Circuit Court was in error in holding that the Association succeeded to the Hall Company's tax exempt status as to the property in question (and assuming that Section 4 of the 1851 Act did not affect the issue,) application of the doctrine of res judicata would not result in unjust discrimination. True, it might well result in injustice (in the abstract sense) just as the preclusive effect of any wrongly decided case results in injustice, but this is not the kind of injustice with which the Supreme Court was concerned in the Breuer and YMCA Cases.

Honorable Hunter Phillips, Chairman

For the foregoing reasons, it is our opinion that even if an assessor would be foolhardy enough to subject himself to the possibility of a contempt of court proceeding by violating the express injunction contained in the 1953 Judgment, our courts would void any assessment for taxation on the ground that the Circuit Court Judgment has conclusively established the tax exempt status of the property. The injunction would not, however, preclude a school district or other taxing authority, not a party to the 1953 Judgment, from seeking, by declaratory judgment or other proceeding, to determine whether the property is presently exempt from taxation either because of the facts or the doctrine of res judicata.

Article 1, Section 7, of the Corporation Act of 1845, reserved to the legislature the right in its discretion to alter and repeal the charter of every corporation thereafter granted. So far as we are aware, the General Assembly has never expressly attempted, at least since the adoption of the 1865, 1875 and 1945 Constitutions, to exercise the right reserved in the 1845 Corporation Law. Whether the general assembly could do so now, and whether such action would be sustained by the courts is, we believe, an open question. In *Trustees of William Jewell College of Liberty v. Beavers* (en banc 1943,) 351 Mo. 87, 171 S.W.2d 604, 610, the Supreme Court said, on Motion for Rehearings:

"Therefore, whatever may be the power of the state to repeal plaintiff's tax exemption under the reservation in the general corporation law of 1845, it did not do so by adopting the Constitution of 1865 and 1875, or by general statutes enacted for the purpose of carrying out the provisions of those Constitutions."

Very truly yours,

NORMAN H. ANDERSON
Attorney General

PROSECUTING ATTORNEYS:
COUNTY EMPLOYEES:
SALARY FOR PROSECUTING
ATTORNEYS' STENOGRAPHERS:
SALARIES AND FEES:
FEES AND SALARIES:
EMPLOYEES:

MS
Stenographic and clerical help employed by prosecuting attorneys of third and fourth class counties under the authority of Section 56.245, RSMo Supp. 1967, are employees of the county and not of the prosecuting attorney, and, therefore, such employees are entitled to receive compensation from the county for the period between the date of

death of the prosecuting attorney and the date the vacancy of the office was filled by appointment by the Governor during which period there was an acting prosecuting attorney. The person appointed as special prosecutor upon the absence of the prosecutor is not entitled to any remuneration for his services other than that as provided by Section 56.130, RSMo 1959.

OPINION NO. 235

December 12, 1968

Honorable Haskell Holman
State Auditor
State of Missouri
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in answer to your request for an opinion of this office asking two questions concerning prosecuting attorneys which read as follows:

"When a prosecuting attorney is absent from his office due to illness and the court appoints some person as acting prosecuting attorney and the duly elected official dies and the appointed acting prosecuting attorney continues to serve until the vacancy of the office is filled by appointment by the Governor, the following questions are posed:

"1. Would the stenographic and/or clerical help that had been employed by the duly elected prosecuting attorney be entitled to receive compensation from the county revenue fund for the period between the date of death of the prosecuting attorney and the date the vacancy of the office was filled by appointment by the Governor?

"2. Would the person serving as acting prosecuting attorney be entitled to any remuneration for his services other than that as provided by Section 56.130, RSMo., 1959?"

Honorable Haskell Holman

You have further informed us that your question relates to third and fourth class counties.

If the stenographic and clerical help are employees of the county who can perform their duties when an acting prosecuting attorney has been appointed, then the answer to your first question is clearly yes.

The controlling statute, enacted in 1961, is Section 56.245, RSMo Supp. 1967, which reads as follows:

"The prosecuting attorney in counties of the third and fourth class may employ such stenographic and clerical help as may be necessary for the efficient operation of his office. The salary of any stenographer or clerk so employed shall be fixed by the prosecuting attorney with the approval of the county court to be paid by the county but such salary shall not exceed four thousand dollars per year in third class counties and one thousand eight hundred dollars per year in fourth class counties."

Prior to the enactment of Section 56.245, supra, in 1961, there was no statutory provision for the employment of stenographers and clerical help by prosecuting attorneys in third and fourth class counties, nor for the payment of salaries by the county. Thus, prior to 1961 it was held that stenographers were employees of the prosecuting attorneys in third and fourth class counties and not employees of the county. Such employees, therefore, were not paid by the county but by their employer, the prosecuting attorney. The prosecuting attorney could, however, be reimbursed by the county for payment of such salaries as being necessary expenses of performing the duties of the office. *Rinehart v. Howell County*, 348 Mo. 421, 153 S.W.2d 381 (1941); *Miller v. Webster County, Mo.*, 228 S.W.2d 706 (1950). The court noted in both cases that the General Assembly had authorized and established salaries for stenographic services to prosecuting attorneys in larger counties indicating that in such instances stenographers are employees of the county.

The enactment of Section 56.245, supra, in 1961, placed third and fourth class counties in the same category as the larger counties referred to by the court. Section 56.245 states that the salary of any stenographer or clerk employed by the prosecuting attorney in third and fourth class counties is "to be paid by the county." It is our opinion that stenographic and clerical help employed by prosecuting attorneys of third and fourth class counties under the authority of Section 56.245 are employees of the county and not of the prosecuting

Honorable Haskell Holman

attorney. It follows, therefore, that in the instant situation the stenographic and clerical help that had been employed are entitled to receive compensation from the county for the period between the date of death of the prosecuting attorney and the date the vacancy of the office was filled by appointment by the Governor.

In answer to your second question, we are enclosing copies of Attorney General's Opinion No. 52, dated January 25, 1952, issued to Mr. Walter R. Lethem, Jr., and Opinion No. 412, dated December 19, 1967, issued to the Honorable James L. Paul. We know of no statute providing remuneration for the services of the special prosecutor other than that provided by Section 56.130, supra, and therefore conclude under the enclosed opinions that there is no other remuneration.

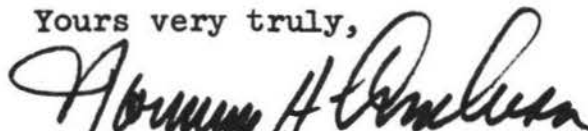
CONCLUSION

It is the opinion of this office that stenographic and clerical help employed by prosecuting attorneys of third and fourth class counties under the authority of Section 56.245, RSMo Supp. 1967, are employees of the county and not of the prosecuting attorney, and, therefore, such employees are entitled to receive compensation from the county for the period between the date of death of the prosecuting attorney and the date the vacancy of the office was filled by appointment by the Governor during which period there was an acting prosecuting attorney.

It is our further opinion that the person appointed as special prosecutor upon the absence of the prosecutor is not entitled to any remuneration for his services other than that as provided by Section 56.130, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Walter W. Nowotny, Jr.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

Enc. Op. No. 52, 1-25-52, Lethem
Op. No. 412, 12-19-67, Paul

April 16, 1968

Honorable Richard J. Blanck
Prosecuting Attorney
Cooper County Court House
Boonville, Missouri



Dear Mr. Blanck:

You inquire if "guards, house parents, and correctional officers" at the Training School for Boys are "peace officers" within the meaning of Section 557.215 RSMo 1967 Cum. Supp., which makes it a felony to attack such a person in the performance of his duties.

We are of the opinion that the very nature of the institution involved would obviate bringing any of its employees under the general definition of "peace officer."

Enclosed is a prior opinion of this office touching on the subject, Opinion No. 189 (1966) rendered under date of May 26, 1966 to Honorable Harold S. Hutchison, which we believe sustains the position set out above.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Encl:

Opinion No. 189
May 26, 1966
Honorable Harold S. Hutchison

CITIES, TOWNS & VILLAGES:
BONDS:
COOPERATIVE AGREEMENTS:
COUNTY BUILDINGS:
MUNICIPAL BUILDINGS:

(1) the City of Columbia and Boone County may cooperate in the acquisition or building of an office building to be used jointly for administrative offices, (2) that revenue bonds cannot be used by the City of Columbia or Boone

County for the purpose of financing the acquisition or construction of such a building (3) by a vote of the people general obligation bonds may be issued by the City of Columbia and by Boone County for financing the acquisition or construction of such a building.

OPINION NO. 237

November 14, 1968



Honorable George W. Parker
State Representative - District 120
Missouri House of Representatives
819 Crestland
Columbia, Missouri 65201

Dear Representative Parker:

This is in response to your question whether the City of Columbia, a constitutionally chartered city, may join with Boone County, which will become a second class county on January 1, 1969, in building an office building to be used jointly, and if so, the options that are available in the financing of such a building.

Article VI, Section 16, Constitution of Missouri, provides as follows:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

This section authorizes the legislature to pass laws respecting cooperative agreements between a municipality and a political subdivision for the planning, development, construction, acquisition or operation of any public improvement or facility or for a common service. Implementing this constitutional provision, the legislature enacted Section 70.220, RSMo, which provides as follows:

Honorable George W. Parker

"Any municipality or political subdivision of this state, . . . may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, . . . for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality . . . and an elective or appointive official of another . . . political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides."

It is our view that the acquisition or construction of a building to be used jointly by the City of Columbia and Boone County for administrative offices and other public purposes comes within the terms of this statute authorizing a municipality or political subdivision to cooperate in the acquisition, construction, or operation of a "public improvement or facility or for common service" provided that each has authority to provide such public improvement, facility or common service separately and independently. The question then arises as to whether Columbia has authority to acquire or construct an office building to be used by the city for administrative purposes or other public service and whether Boone County has such authority separately and independently of the authority of Columbia.

Article II, Section 3 of the charter of Columbia provides that Columbia has "all powers possible for a city to have under the Constitution and laws of Missouri, or which it would be competent for this charter specifically to enumerate, or for the General Assembly to grant, including all powers enumerated by the statutes of this state now or hereafter applicable to cities of any class or population group whatsoever; and except as prohibited by the Constitution or laws of the state, the city may exercise all municipal powers, functions, rights, privileges and immunities of every nature whatsoever."

Article II, Section 18 (10) of the said charter authorizes the city council to "acquire, receive, hold, provide for by contract or otherwise, construct, operate, regulate, manage, maintain and improve all kinds of public buildings, structures, . . . all other public improvements, and any other property . . . within or without the city . . . for any other public or municipal use or purpose; acquire,

Honorable George W. Parker

receive and hold any estate or interest in any such property; and sell, lease, mortgage, pledge or otherwise dispose of the same or the products thereof. The power herein granted shall be limited only by prohibitions contained in the Constitution and laws of Missouri and other provisions of this charter."

It is the opinion of this office that the City of Columbia under charter provision has authority to acquire or construct a building to be used for administrative offices or other public purposes of the above charter provisions.

Section 49.510, RSMo 1959, provides:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

Section 49.270, RSMo 1959, provides:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or received by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

It is our view that under the above statutes Boone County has authority to purchase or construct a building to be used by the county for administrative offices and other public purposes.

Since the City of Columbia and Boone County each have authority to purchase a building or otherwise acquire a building to be used as an office building for its officers and for the transaction of other public business, it follows that under Section 70.220, supra, they have authority to contract and cooperate with each other in the construction, acquisition, and operation of a building to be used by the officers of each for offices and other public purposes.

You inquire what methods are available for financing a project such as the one now under consideration and particularly whether it could be financed by the issuance of revenue bonds.

Honorable George W. Parker

Section 70.250, RSMo, provides that any municipality or political subdivision may provide for the financing of its share of the cost and expenses of the project in the same manner as it could finance it as if acting alone.

It is our opinion that revenue bonds cannot be used by the City of Columbia or by Boone County for the purpose of financing an office building.

The charter of the City of Columbia has no provision authorizing revenue bonds to be used for the acquisition or construction of an office building, and there is no statute providing for revenue bonds to be used by the City of Columbia or by Boone County for such purpose. A municipality or political subdivision of the state has only such authority as is expressly given them and such implied authority as is necessary to execute the express power given. *Lancaster v. County of Atchison*, 180 S.W.2d 706.

Assuming that neither the City of Columbia nor Boone County has available funds for the acquisition or construction of an office building, it is our opinion that general obligation bonds may be used for this purpose.

Section 108.010, RSMo, provides:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years; provided such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Section 108.020, RSMo, provides:

"Any county in this state, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an indebtedness for county purposes in addition to that authorized in section 108.010 not to exceed five per cent of the taxable tangible property shown as provided in said section."

It is the opinion of this office that Boone County may finance its portion of the cost of the office building by the issuance of general obligation bonds under Section 108.010 and Section 108.020, supra, by vote of two-thirds of the qualified voters voting thereon as provided in Chapter 108, RSMo.

Honorable George W. Parker

Section 95.115, RSMo, provides:

"Any city, incorporated town or village of the state, whether organized under the general laws of this state or by special charter or by constitutional charter, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years for any purpose authorized in the charter of such city, incorporated town or village, or by any general law of this state; provided, such indebtedness shall not exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Section 95.120, RSMo, provides as follows:

"Any city, whether organized under the general laws of this state or by special charter or by constitutional charter, by vote of two-thirds of the qualified electors thereof voting thereon, may incur an additional indebtedness for city purposes authorized in the charter of such city or by any general law of this state, not to exceed five per cent of the taxable tangible property therein as shown by the last completed assessment for state and county purposes."

It is the opinion of this office that the City of Columbia may finance its portion of the cost of an office building by the issuance of general obligation bonds by a vote of two-thirds of the qualified voters as provided under Chapter 95, RSMo.

CONCLUSION

It is the opinion of this department that: (1) the City of Columbia and Boone County may cooperate in the acquisition or building of an office building to be used jointly for administrative offices; (2) that revenue bonds cannot be used by the City of Columbia or Boone County for the purpose of financing the acquisition or construction of such a building, (3) by a vote of the people general obligation bonds may be issued by the City of Columbia and by Boone County for financing the acquisition or construction of such a building.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Moody Mansur.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

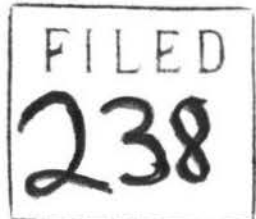
TAXATION (SALES TAX):

The total amount of the monthly water bills paid by patrons of Public Water Supply District No. 2, of Barton County, are subject to the State Sales Tax.

OPINION NO. 238

May 2, 1968

Honorable Edison Kaderly
Prosecuting Attorney
Barton County
Lamar, Missouri 64759



Dear Mr. Kaderly:

This opinion is in response to your request concerning the portion of monthly water bills which is subject to Missouri Sales Tax. The pertinent facts are stated as follows:

"Public Water Supply District No. 2, of Barton County, Missouri, borrowed \$200,000 from the United States Government on a water works revenue bond payable in annual installments of \$11,020.

The rural water district has 193 customers, and to pay principal and interest will collect \$918.33 a month from these customers, or \$4.75 per customer for debt retirement.

The monthly billing for each customer will be as follows:

Monthly debt retirement contributions	\$4.75
First 1,000 gallons used	1.00
Second 1,000 gallons used	1.00
Next 2,000 gallons used	.90 per M
Next 2,000 gallons used	.80 per M
Next 4,000 gallons used	.70 per M
All additional gallons	.60 per M

The bonds to be retired are waterworks revenue bonds payable solely from revenues and not from taxes. They are issued pursuant to the authority granted a rural water district in Section 247.130, Revised Statutes of Missouri, 1959."

Honorable Edison Kaderly

The applicable section of the Missouri Sales Tax provisions is Section 144.020, RSMo Cum. Supp. 1967, which provides as follows:

"1. A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.
The rate of tax shall be as follows:

* * * * *

(3) A tax equivalent to three per cent of amounts paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers;

* * * * *

(Emphasis added.)

The section under which the bonds in question were issued is Section 247.130, RSMo 1959, which provides as follows:

"5. Special obligation bonds, within the meaning of sections 247.010 to 247.220, shall be bonds payable, both as to principal and interest, wholly and only out of the net income and revenues arising from the operation of the waterworks system of any such district, after providing for costs of operation, maintenance, depreciation and necessary extensions and enlargements, and such bonds shall not be deemed to be indebtedness of any such district within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness. Before or at the time of issuing any such special obligation bonds, the board of directors shall pledge such net income and revenues to the payment of such bonds, both principal and interest, and shall covenant to fix, maintain and collect rates for water and water service supplied by such district so as to assure that such net income and revenues will be sufficient for the purposes herein required."
(Emphasis added.)

Honorable Edison Kaderly

Thus, from the underscored portion of Section 144.020, we see that the sales tax is applied to amounts paid or charged on all sales of water. The underscored portion of Section 247.130 states that the bonds in question may be paid only from the net income and revenue arising from the operation of the waterworks and that the rates collected for water and water service shall be maintained so as to produce a sufficient net income for this purpose.

In pursuance of Section 247.130, the water district in question has computed a charge of \$4.75 to be included within the rates for water and water service so as to provide funds for payment of the special obligation bonds. The fact that the water district has chosen to earmark this part of the charge is of no significance since the tax applies to "all amounts paid or charged" with no exception made for any items which make up the total charge.

Enclosed is a copy of Opinion No. 56, Morris, 4/12/62, a prior opinion of this office, which deals with a similar situation in which there was a question as to the application of the Missouri Sales Tax to a surcharge on a public utility which was passed on to the customers as a separate item on their bills. The ruling in that opinion states that:


"Regardless of whether a utility bills its customers with a single figure showing the total amount charged for services rendered, or if the billing displays a basic charge plus a proportionate charge based upon a local license tax, the customer is still liable for the payment of Missouri sales tax upon the total amount charged."

CONCLUSION

Therefore, it is the opinion of this office that the total amount of the monthly water bills paid by patrons of Public Water Supply District No. 2, of Barton County, are subject to the State Sales Tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

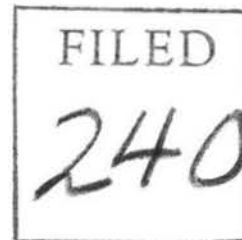
Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enc.--Op. No. 56; Morris; 4/12/62

Review and certification of Missouri
State Department of Education's
Application for Amendment to Program Grant
for Migratory Children FY 68 (Title I,
PL 89-10 as amended by PL 89-750)

March 29, 1968



Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Hubert:

Per your request, we have reviewed the Missouri State Department of Education's Application for Amendment to Program Grant for Migratory Children FY 68 (Title I, PL 89-10 as amended by PL 89-750).

We call to your attention our previously expressed concern for the State Board of Education's lack of authority to enter into contractual agreements (Opinion Letter No. 313, Wheeler, 6/21/67 and correspondence of March 20, 1968). Since the present application provides for subgrants and voluntary arrangements, we need not rule upon that matter today.

Based upon the provisions of Article 3, Section 38A, Missouri Constitution, and Section 161.092 RSMo. Supp. 1967, we hereby certify that the State Board of Education of the State of Missouri has authority under state law to perform the duties and functions of a state educational agency as defined under Title I of PL 89-10 including those arising from the assurances set forth in the application and that the State Board of Education has authority to submit and administer special educational programs and projects for migratory children as set forth in the application.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

LCDJr:rs

COMPATIBILITY OF OFFICES: An individual employed full time
CONFLICT OF INTEREST: as a deputy sheriff of Buchanan
DEPUTY SHERIFFS: County may serve as a member of
SHERIFFS: the Municipal Excise Board for the
OFFICERS: City of St. Joseph.

OPINION NO. 242

May 14, 1968

Honorable Thomas L. Duty
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri 64501



Dear Mr. Duty:

This is in response to an opinion request by your office in which your assistant Mr. Michael Paul Harris inquires as follows:

"Buchanan County has recently employed an individual as a full time deputy sheriff who is also a member of the Municipal Excise Board for the City of St. Joseph. An opinion has been requested from your office concerning whether or not a deputy sheriff for a second class county in the State of Missouri can serve as a member of a municipal excise board."

It appears that the basic question, therefore, is whether the positions are incompatible.

In considering whether or not the positions are incompatible we must consider whether, under the common law, they are inconsistent, repugnant to each other, or whether the one is essentially subordinate to the other. Likewise, we must also consider whether or not the positions are incompatible by reason of either constitutional or statutory prohibition.

The appointment of deputy sheriffs of second class counties is authorized by Section 57.220, RSMo, and Section 57.270 RSMo, provides that the deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.

Honorable Thomas L. Duty

With respect to the organization of the Municipal Excise Board of the City of St. Joseph, we note that the voters of the City of St. Joseph accepted a constitutional charter form of government in 1961. Article XVI, Section 16.4 of the Charter provides that the council shall have the power to establish advisory boards from time to time and to provide for the scope and powers of such boards as it may deem necessary. Existing ordinances remained in effect by reason of Charter Article XX, Section 20.2.

An examination of the liquor regulations of the City of St. Joseph, which are designated as Article XII of the Municipal Code of the City of St. Joseph, 1949, as amended, indicates that the excise board is authorized by Section 12-489. The appointment, terms and qualifications of the members thereof are controlled by the terms of Article XVI, Section 16.1 and Section 16.2 of the Charter. That is, all such boards shall consist of five members appointed for five years, with staggered terms of office, and among other requirements, shall serve without compensation. The appointment and removal of the members of the board are made by the mayor with the approval of the council

The Municipal Code, Article XII, gives the members of the excise board the authority to consider applications for licenses to sell liquor either wholesale or retail and to make their findings and recommendations to the council. Similarly, the members of the excise board have authority to inspect premises for violations, to hold hearings concerning suspensions or revocations, although the revocation or suspensions do not become effective until confirmed by the council.

While we do not pretend to set out the entire scope of the powers and duties of the excise board, it is quite clear that they are largely advisory and ministerial. Consonant with the provisions of the Charter are the provisions of the Municipal Code which reiterate that no member of the board shall receive any salary, and their duties "shall be limited and confined to investigations and recommendations to the council upon all applications for liquor licenses and the revocations of said licenses." Municipal Code Article XII, Section 12-489.

Our examination of the law with respect to these two positions does not indicate any area of incompatibility either in the common law or the statutory law, nor any inconsistency, repugnancy or subordination.

Honorable Thomas L. Duty -

The most noteworthy case on this subject is State ex rel Walker v. Bus, 135 Mo. 328, 36 S.W. 636 (1896). This case dealt with the positions of deputy sheriff and school board director and has been extensively cited as authority.


It was held in Bus that the deputy sheriff was a public officer under the law of the state, performing duties within a prescribed area. The inquiry was whether the offices of deputy sheriff and of school director of the City of St. Louis were incompatible. The court in holding that they were not, stated that they were unable to discover incompatibility or inconsistency in the public functions of the two offices or where the two offices could possibly come in conflict or antagonism unless the deputy sheriff should be required to serve process upon a school director. Such a possibility, however, was considered too remote to create an incompatibility.

CONCLUSION

It is the opinion of this office that an individual employed full time as a deputy sheriff of Buchanan County may serve as a member of the Municipal Excise Board for the City of St. Joseph.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

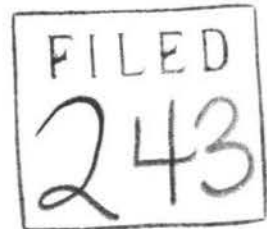
Yours very truly,


NORMAN H. ANDERSON
Attorney General

TAXATION (INTANGIBLE): It is the opinion of this office that the intangible tax on Savings and Loan accounts is to be returned, less two per cent for collection, to the county treasury of the county in which the home office of the association is located. The taxes are to be distributed to the county and other political subdivisions in which the home office of the association is located in proportion to their respective local rates of levy.

June 18, 1968

OPINION NO. 243



Honorable Maurice Schechter
Senator, 13th District
41 Country Fair Lane
Creve Coeur, Missouri

Dear Senator Schechter:

This is in answer to your request of March 27, 1968, which reads as follows:

"A savings and loan association maintains a branch office in the City of Olivette, Missouri. The home office of the association is located in another city in this State. In its Olivette branch office, it opens, processes and otherwise handles accounts for its members. However it makes a single return of the intangible property tax and shows as its residence the city in which its main office is located. Thus no part of the intangible property tax which it pays is returned to the City of Olivette and all such funds are returned to the city in which the main office is located.

Sections 148.470 to 148.530 R.S. Mo. 1959 pertain to intangible property tax for saving and loan associations and the statutes do provide that one return shall be made and I do know that the proceeds of such tax are forwarded to the city in which

Honorable Maurice Schechter

the saving and loan association does maintain its principal office. I would appreciate receiving your Opinion, at your earliest convenience, to determine if this procedure is correct or if part of such proceeds should not be remitted to the various cities and other political subdivisions in which branch offices are located."

In a subsequent telephone conversation, you informed us that the home office was located in University City, Missouri. Both University City and Olivette are located in St. Louis County.

An account in a Savings and Loan Association is subject to a tax levied in accordance with Section 148.480, RSMo 1959. That section states:

"There is hereby imposed upon each person, either natural or corporate, holding personally or in trust, an account in an association, an annual tax of two per cent of the taxable portion of the dividends declared and credited by such association to such account in the preceding year."

Section 148.500, RSMo 1959, specifies that the tax shall be paid in the following manner:

"The association shall compute, withhold and pay to the director of revenue on or before the first day of June of each year, the amounts of all taxes imposed hereby upon its members by Sections 148.470 to 148.530, such payment to be made in one remittance, and the association at its option may absorb such taxes without charging the same to the particular accounts." (Emphasis added).

The preceding section requires the association to file an aggregate tax return which reflects the tax owed by all its members. The association may absorb the cost of these taxes itself or it may charge them to the accounts of their members. In either case, it is the association which is required to file the tax return.

Article X, Section 4(c), Constitution of Missouri, deals with the distribution of taxes collected on intangible personal property. That provision states:

Honorable Maurice Schechter

Section 4(c) "All taxes on property in Class 3 and its subclasses, and the tax under any other form of taxation substituted by the general assembly for the tax on bank shares, shall be assessed, levied and collected by the state and returned as provided by law, less two per cent for collection, to the counties and other political subdivisions of their origin, in proportion to the respective local rates of levy."

The Savings and Loan Associations intangible tax law with which we are presently concerned was enacted in 1945. The law does not contain any provisions providing for a return of portions of the tax money to the counties and its political subdivisions. However, a former opinion of this office, Op. Atty. Gen. No. 64, Morris, 8-13-47, held that the proceeds collected pursuant to this law were to be distributed "in the same manner as those collected under other intangible personal property tax laws." The basis for that holding was the constitutional provision quoted above.

The general intangible tax law is found in Chapter 146. Section 146.110, RSMo 1959, states that the intangible tax, less two per cent, is returned to the county treasury of the county where the taxpayer is domiciled or where the intangible property had its business situs. Local rates of levy are applied to determine the exact amount due each political subdivision. Section 148.080, RSMo 1959 provides that the intangible bank tax be returned, less two per cent, to the county treasury of the county in which the taxpayer is located. The intangible tax on insurance premiums is returned to the county treasurer and treasurer of school district in which the principal office of the company is located. Section 148.330, RSMo 1959. Section 148.220, provides that the intangible tax levied against Consumer Credit institutions be returned to the county treasury of the county in which the taxpayer is located.

In all of the foregoing laws, only one taxpayer or one business situs, or one office is contemplated in determining the location of the county and political subdivisions which are to receive the intangible tax proceeds. The Savings and Loan intangible tax provisions are consistent with this when they require that only one tax return be filed. It is our opinion that this one return is to be filed by the home office and that the business residence of the home office will determine the county which is to receive the tax money, notwithstanding the fact that branch offices are located in other counties.

Honorable Maurice Schechter

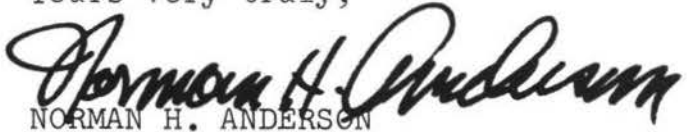
However, our problem goes beyond this. The branch office of the association is located in the City of Olivette and the home office is in University City both of which are in St. Louis County. The Director of Revenue allocates the tax money to St. Louis County and to University City and to other political subdivisions in which the home office of the association is located, but no part of it is returned to the City of Olivette. The rationale behind this is that the business address of the home office is University City and only those political subdivisions in which the home office is located are entitled to share in the proceeds of the tax. This seems to be the reasonable meaning of Article X, Section 4(c) of the Constitution when it says that taxes shall be returned ". . . . to the counties and other political subdivisions of their origin. . . ." (emphasis added). It is important to note that the Constitution does not say that the proceeds shall be returned to the counties and their political subdivisions in which case all of the respective subdivisions would seem to be included.

CONCLUSION

It is the opinion of this office that the intangible tax on Savings and Loan accounts is to be returned, less two per cent for collection, to the county treasury of the county in which the home office of the association is located. The taxes are to be distributed to the county and other political subdivisions in which the home office of the association is located in proportion to their respective local rates of levy.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gary G. Sprick.

Yours very truly,

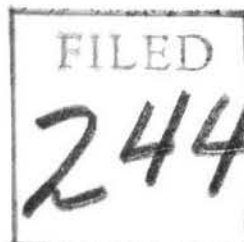

NORMAN H. ANDERSON
Attorney General

FEDERAL-STATE AGREEMENTS:
ELEMENTARY AND SECONDARY EDUCATION
ACT OF 1965

Certification of State Appli-
cation for Participation in
Title III Elementary and Secondary
Education Act of 1965 as amended
by PL 90-247 grants for supplementary education centers and services.

Opinion No. 244-68
Answered by Letter
DeFeo

April 23, 1968



Mr. Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Wheeler:

Per your request, we have reviewed the State Application to Participate in Title III of Public Law 89-10, (as amended by Public Law 90-247). Our review has considered the applicable federal laws, Title 20 USC, Sections 841 et seq. as amended by the Elementary and Secondary Education Amendment of 1967, (Public Law 90-247, Section 131); the preliminary federal regulations (Draft 4/1/68); Article IX, Section 2(a) Missouri Constitution; Section 161.092 RSMo. Supp. 1967 and the resolution of the State Board of Education authorizing the Commissioner to submit the present Application.

Based upon the foregoing we hereby certify that the State Board of Education of the State of Missouri has the authority under state law to perform the duties and functions of a state educational agency under Title III of Public Law 89-10 as amended by Section 131 of Public Law 90-247 including those duties and functions arising from the assurances given in the above-mentioned Application.

The present certification relates only to the instant Application for Participation and is not a review of certification of the state plan to be submitted under Title III as amended.

We are returning herewith the original and one copy of the state application.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

LCDJr:rs

CONFLICT OF INTEREST:
CITY COUNCILMAN:
INSURANCE:

A member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo. Cum. Supp. 1967, and Section 106.300, RSMo. 1959, if he furnishes insurance to the

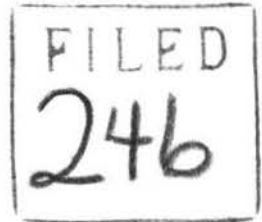
city. A city councilman would also violate Section 105.490 and Section 106.300 if he was a member of the Ray County Insurance Agents Association and, as such, participated in the division of the agent's commission made among the members of said association.

See 1978 amendments To Ch. 105

OPINION NO. 246

September 12, 1968

Honorable Charles H. Sloan
Prosecuting Attorney
Richmond, Missouri



Dear Mr. Sloan:

This is in reply to your request of March 28, 1968, reading as follows:

"Please have your office render an official opinion as to an alleged violation of Missouri's conflict of interest laws. The question concerns a member of the city council of Richmond, Missouri, which is a third class city. The city has previously placed their fire and casualty insurance through the Ray County Insurance Agents Association, using the names of only two agents but apportioning part of the premium to all of the members of the said association. In October, 1967, the policies were to be renewed and the city council awarded the insurance contracts to an individual who is also a member of the city council. He is not a member of the Ray County Insurance Agents Association; however, he apparently had made application for membership and was refused. Said councilman was present at the meeting that they awarded the said insurance contracts but did not vote.

Also, please have your office render a further opinion as to whether a member of this association who is a councilman and participates in the premium division is in violation of the conflict of interest laws. The insurance was not placed with that said agent as an individual."

Honorable Charles H. Sloan -

The conflict of interest statute which is involved here is Section 105.490, RSMo. Cum. Supp. 1967:

"1. No officer or employee of an agency shall transact any business in his official capacity with any business entity of which he is an officer, agent or member in which he owns a substantial interest; nor shall he make any personal investments in any enterprise which will create a substantial conflict between his private interest and the public interest; nor shall he or any firm or business entity of which he is an office, agent or member, or the owner of substantial interest, sell any goods or services to any business entity which is licensed by or regulated in any manner by the agency in which the officer or employee serves.

2. Any person who violates the provisions of this section shall be adjudged guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than five hundred dollars or by confinement for not more than one year, or both."

A previous opinion of this office, Op. Atty. Gen. No. 312, Gum, 12-21-67, a copy of which is enclosed, held that a city councilman of a fourth class city, who was also an insurance agent, would violate Missouri's Conflict of Interest Law by furnishing insurance to the city whether or not he was the low bidder. The rationale of the opinion, based upon Section 105.490, was that a city councilman was prohibited from transacting any private business with the city which he served as councilman. The city council of a third class city is entrusted with the management and welfare of the city's interest. Section 77.260, RSMo. 1959. The purpose of Section 105.490 is to remove even the possibility of personal influence in official decisions of governmental agencies.

The first question that you pose deals with the situation where a city councilman was awarded the city's insurance contracts as an individual agent. The councilman was present at the meeting which awarded the insurance contracts to him but he did not vote on the issue. However, we do not feel that this factor enables the councilman to elude the reach of the Conflict of Interest Law.

In cases concerning nepotism in Missouri, the courts have found that it is important to determine whether or not a public official accused of nepotism actually participated in, or voted on, the authorization which resulted in the hiring of a relative.

Honorable Charles H. Sloan -

The constitutional amendment prohibiting nepotism was interpreted in McKittrick v. Whittle, 63 S. W. 2d 100. It was said in that case:

"* * * The amendment is directed against officials who shall have (at the time of the selection) 'the right to name or appoint' a person to office. Of course, a board acts through its official members, or a majority thereof. If at the time of the selection a member has the right (power) either by casting a deciding vote or otherwise, to name or appoint a person to office, and exercises said right (power) in favor of a relative within the prohibited degree, he violates the amendment. * * *"

We are not concerned here with nepotism but, rather, a conflict of interest problem. If the purpose of Section 105.490 is to be served, it cannot be thwarted by merely having an interested official fail to vote on the business transaction in question. The Missouri Supreme Court has said that municipal officers may not enter into contracts with the municipality that they represent. In Githens v. Butler County, 165 S. W. 2d 650, 652, the Court said:

"* * * It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract or in its performance. In general the disqualifying interest must be of a pecuniary or proprietary nature."

This rule is now supplemented by Section 105.490, RSMo. Cum. Supp. 1967. It is unlawful for a public official to transact private business with the agency that he represents. There is no requirement that he participate in the meeting which authorizes the business or that he cast his vote for the proposition. A councilman who furnishes insurance to the city that he represents is transacting business with the city. He is doing so both as an insurance agent and as a councilman. He is acting as a private businessman and a public official at the same time. Under the statute with which we are dealing, he cannot simultaneously wear two hats. We feel that this comes within the ambit of Section 105.490 as it was interpreted in the former opinion of this office which we have attached hereto.

Honorable Charles H. Sloan -

There is a continuing relationship between the city council and the insurance company during the life of the insurance contract. The city council has a duty to take action in regard to the insurance contract when circumstances arise which call for such action. The councilman who furnished insurance to the city shares the continuing duty of the council to periodically review the insurance coverage and to take necessary actions in regard to it. Therefore, whether or not he voted on the matter in the first instance, the councilman's continuing duty or act when circumstances call for such action (whether or not such circumstances actually ever arise) is the transaction of business within the meaning of the statute.

Section 106.300, RSMo. 1959, should also be considered in resolving your question. That section in part reads as follows:

"If any city officer shall be directly or indirectly interested in any contract under the city, or in any work done by the city, or in furnishing supplies for the city, or any of its institutions, he shall be deemed guilty of a misdemeanor; . . ."

We believe that this statute would apply when a member of the city council receives an insurance contract from the city himself or if he shares in payment of the insurance contract which is awarded to another person. Again, we note that this statute does not hinge upon whether or not the interested councilman votes for the insurance coverage. The vice lies in his interest, not in how he votes on the issue.

The matter of voting by city councilmen has been discussed in a previous opinion of this office, Op. Atty. Gen., No. 249, 8-6-65, a copy of which is enclosed. The opinion holds that it is the general rule that where someone who is present but refuses to vote on a proposition or remains silent is regarded as having voted affirmatively or with the majority of those who voted. In our situation, this would mean that even if the councilman abstains from an active vote he is legally counted with the majority who voted to obtain the insurance.

The second question that you pose presents the problem somewhat differently. As we understand the arrangement, the city council would select insurance coverage from one or two local agents who were not members of the city council. The part of the insurance premium applicable to the agent's commission is then divided among the members of the Ray County Insurance Agents Association. Our question arises when a member of that Association, sharing in the division of the agent's commission, is also a member of the city council which purchased the insurance for the city.

Honorable Charles H. Sloan -

The purpose of Section 105.190, as expressed in this opinion and in the former opinion of this office upon which we rely, leads us to conclude that this arrangement is also precluded by the statute. We feel that it also violates Section 106.300, RSMo. 1959. The Ray County Insurance Agents Association does not include as members all of the insurance agents in the area. A councilman who was a member of that association would gain if insurance was placed with an agent who was also a member of the association rather than with an agent who was not a member of the association. The scheme would allow a councilman to profit merely because he was an insurance agent and a member of the Agent's Association even though he offered no service to the city. Conflict of interest laws should not be construed to allow something to be done indirectly that can not be done directly.


CONCLUSION

A member of the city council of a third class city who is an insurance agent violates Section 105.490, RSMo. Cum. Supp. 1967, and Section 106.300, RSMo. 1959, if he furnishes insurance to the city.

A city councilman would also violate Section 105.490 and Section 106.300 if he was a member of the Ray County Insurance Agents Association and, as such, participated in the division of the agent's commission made among the members of said association.

The foregoing opinion, which I hereby approve, was prepared by my assistant Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

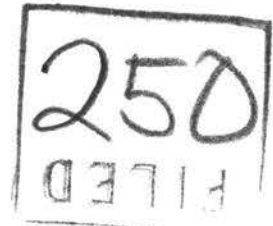
Enc. Op. No. 312, Gum, 12-21-67
Op. No. 249, Schechter, 8-6-65 } *Withdrawn*

POLITICAL PARTIES:
PARTY COMMITTEE:
DATE OF CONGRESSIONAL
DISTRICT COMMITTEE MEETING:

Under Section 120.820, RSMo. Supp.
1967, pertaining to political parties,
Congressional District Committees
must meet on "the last Tuesday in
August after the primary election".

Opinion No. 250-68

June 18, 1968



Honorable Paul J. Simon
Representative of the 55th District
2756 A Lafayette Avenue
St. Louis, Missouri 63104

Dear Mr. Simon:

This is in reply to your recent inquiry requesting an official opinion of this office on the following question, as stated in your letter:

"I would like to request an opinion on the following matter. Under Section 120.820 Revised Statutes of Missouri, 1959, Congressional District Committees are required to meet on the last Tuesday in August following the primary election. As you are aware, the last Tuesday in August is the 27th and the Democratic National Convention convenes on August 26th. I would like to have an opinion as to the following; whether or not we are required to hold Congressional District meetings on the last Tuesday, and if so, can they be continued."

Section 120.820 RSMo. Supp., 1967, provides:

"The members of each congressional district committee as so chosen shall meet at some point within the district, to be designated by the then chairman of the congressional committee, on the last Tuesday in August after the primary election and organize by the election of one of their number as chairman and one as vice-chairman, one of whom shall be a woman, and by the election of a secretary, and treasurer, one of whom shall be a woman, but who may or may not be members of the committee, and having so organized such committee shall proceed to elect three men and three women, qualified electors of the district, as members of the party state committee." (emphasis added)

Honorable Paul J. Simon

Although there is no direct Missouri precedent which construes the meaning of this particular section as it relates to your question, ample legal authority has been found discussing the manner in which the courts have construed the meaning of the word "shall" in various statutes.

Statutes requiring the closing of general registration at a certain time prior to elections have been held mandatory (State vs. Flynn (St.L. MA 1941) 147 SW2d 210; State vs. Ridge (Mo. Sup. en banc 1938) 123 SW2d 20); and in State vs. Wade (Mo. Sup. en banc 1950) 231 SW2d 179, the court held mandatory a statute containing the word "shall" and requiring the Ozark County Court to file a financial statement, there being a penalty provided for failure to do so. General statutory principles on nominations by political bodies are found in 29 CJS, Elections:

"To give validity to its nominations, a convention of delegates must be held at the place fixed by the rules of the party; reasonable notice of the time and place must be given to the delegates. A statute fixing the time for a mass meeting for the nomination of candidates has been held mandatory; [Kinney v. House, Ala, 10 S2d 167] apart from such statute, a mass convention must be held at a time and place where citizens so inclined will have opportunity to assemble and participate." (29 CJS Elections, § 100, p.239).

"A statute pertaining to the notice to be given of a party caucus has been held mandatory, so that a purported nomination made on inadequate notice is void. [Densmore v. Western 11, 115 NYS 2d 863]" (Supra CJS, § 104, p. 243).

It is clear that the requirement of Section 120.820 that the congressional district committee meet on the last Tuesday in August after the primary election is part of an over-all design in Chapter 120, RSMo., regarding the organizational method of the formal structure of political parties. Although we do not rule on Section 120.800, RSMo., we note that it requires the various county committees to meet on the third Tuesday in August and select a chairman and vice-chairman, who become members of the "party congressional, senatorial and judicial committees of the district of which their county is a part".

The statutory function at the August meetings of the congressional district committees, which have been chosen at the time of the county committee meetings (Sections 120.800 and 120.810, RSMo.), is for each such committee to elect six members of the party state committee. Obviously, the congressional district committee cannot meet until after the county committee elects its membership, and

Honorable Paul J. Simon

the only definite time limit or restriction on the congressional district committees' action would seem to be the time necessary for transmitting the names of the members which they have elected to the state committee, prior to the second Tuesday in September, the statutory date of their meeting in Jefferson City (Section 120.830).

It thus would seem that the legality of a congressional committee meeting by unanimous consent on a date other than the last Tuesday in August could not be successfully challenged, as long as their function was timely performed; but the mandate of the statute to initially meet on a date certain is obviously designed to provide a dependable notice to interested members of the public, and such a right should be strictly construed.

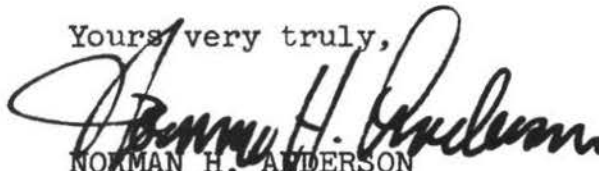
In light of the applicable legal authorities, it therefore seems reasonable to construe the word "shall" in Section 120.820 as mandatory.

CONCLUSION

It is therefore our conclusion that under Section 120.820, RSMo. Supp. 1967, pertaining to political parties, the word "shall" signifies a mandatory requirement that congressional district committees must initially meet only on "the last Tuesday in August after the primary election".

The foregoing opinion, which I hereby approve, was prepared by my assistant, William L. Culver.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

CONSTITUTIONAL CHARTER CITIES: The City Charter of Kansas City,
EARNINGS TAX: Missouri, can not be amended by
MUNICIPAL CORPORATION: a vote of the people so as to
TAXATION: authorize the imposition of a
one per cent earnings tax by
Kansas City without enabling leg-
islation by the Missouri General
Assembly.

OPINION NO. 252

May 2, 1968

Honorable R. D. "Pete" Rodgers
State Representative
Jackson County - 9th District
333 So. Elmwood
Kansas City, Missouri 64124



Dear Representative Rodgers:

This is in answer to your request for an opinion of this office as to whether the City Charter of Kansas City, Missouri, can be amended by a vote of the people so as to authorize the imposition of a one percent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.

First, it should be stated that we are aware of and have studied the recently issued opinion of the City Counselor of Kansas City answering the very question presented here. That opinion suggests the question should be presented to the courts. The opinion states on page 15:

"The question of what the rationale of the Supreme Court will be on this issue, if squarely presented, is difficult to say, and there are strong arguments upon either side, so the problem is a most difficult one to answer. I believe the court can and is likely to hold the specific charter amendment is within the power of the electorate to grant in order to increase the rate of tax...."

Honorable R. D. "Pete" Rodgers

We agree that the courts will have to decide the matter. We do not agree with the conclusion of the Kansas City Counselor's opinion insofar as it holds that the Supreme Court is likely to hold that the tax rate can be increased by a charter amendment without amendment of the statute.

The answer to the question is determined by Sections 92.210 through 92.300, RSMo Supp. 1967, which provide for an earnings tax for Kansas City. However, before discussing those sections a discussion should be made of the basic powers of constitutional charter cities to tax.

Kansas City adopted its charter under the provisions of what is now Section 19, Article VI, Constitution of Missouri, which reads in part as follows:

"Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state, in the following manner...."

Section 1, Article X, Constitution of Missouri, is the basic grant of power for cities to tax and reads as follows:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

Section 10(a), Article X, Constitution of Missouri, reads as follows:

"Except as provided in this Constitution, the general assembly shall not impose taxes upon counties or other political subdivisions or upon the inhabitants or property thereof for municipal, county or other corporate purposes."

A city has no inherent power to tax. The power to tax is in the state and may be delegated by constitutional provision or statutory enactment. The authority to tax must be expressly granted or necessarily incident to the powers conferred. In case of doubt the power is denied. *Siemens v. Shreeve*, 317 Mo. 736, 296 S.W. 415, [1-3] (1927).

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In *Kansas City, Mo., v. J. I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195, 198 [1-3] (1935), the Supreme Court of Missouri said:

"....The first question for determination here, therefore, is the fundamental one of the source of the city's taxing power and control of the Legislature over that power. Since it is well settled that a municipal corporation has no powers which are not derived from and subordinate to the state, Kansas City's powers must come from either a constitutional or legislative grant...."

The Supreme Court of Missouri in *Siemens v. Shreeve*, *supra*, discussed the effect of a city charter as follows, 1.c. S.W. 416, 417 [4-6]:

"A city framing its own charter under the Missouri Constitution has been declared by the highest judicial authority in the land to be in a very just sense an imperium in imperio, and to the prescribed extent this is true....A charter framed by a city for itself under direct constitutional grant of power so to do has, within the limits therein contemplated, the force and effect of one granted by an act of the Legislature when unrestrained by constitutional provision....Important restraining provisions, however, appear in clauses of section 16, art. 9, of the Constitution of 1875, the very section that permits cities having a population of more than 100,000 inhabitants to frame charters for their 'own government' and under which this charter was framed, limiting the exercise of this power to the formation of such charters only as shall be 'consistent with and subject to the Constitution and laws of the state,' and 'always be in harmony with and subject to the Constitution and laws of the state.' Both the grant and the limitation must be given effect. If the limitation is construed to mean that the charter must be consistent with every provision of the Constitution and every law of the state, then the limitation simply

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nullifies the grant....On the other hand, to treat the charter as 'out of, and beyond, all legislative influence,' would be to nullify the express constitutional limitation....Either construction would be extreme and unthinkable. Even if the imposition of this license tax be a matter purely local and municipal in character, as to which we express no opinion, we take it that any attempted charter grant of such power is subject to the above restraining clauses of the Constitution...."

The Court then quoted Section 1, Article X, supra, and stated, l.c. S.W. 417 [9]:

"Evidently, therefore, when the limitation was written in section 16 of article 9 that such charters should be 'consistent with and subject to the Constitution and laws of the state' and 'always be in harmony with and subject to the Constitution and laws of the state,' it was intended that they should be consistent with and subject to statutes of general application defining the scope of the policy of the law with reference to the all important and jealously guarded power to tax."

Section 16, Article 9, referred to by the Court is now Section 19, Article VI of the 1945 Constitution.

The Court in *Kansas City, Mo., v. J. I. Case Threshing Mach. Co.*, supra, said, l.c. S.W.2d 200:

"....It is evident that the authority granted by section 16, art. 9, did not make the people of such cities independent of the Legislature in all matters and delegate to them legislative authority to decide all policies concerning the affairs of government to be carried on in their areas...."

And:

"....It is an essential element of all

Honorable R. D. "Pete" Rodgers

constitutional provisions establishing the principle of municipal home rule that the constitution and general laws of the state shall continue in force within the municipalities which have framed their own charters, and that the power of the municipality to legislate shall be confined to municipal affairs. On the other hand, after the adoption of a home rule charter by a municipal corporation, the Legislature cannot, even by a general law, affect the powers of the municipality with respect to matters of municipal and local concern...."

The tax in question was an occupational tax and the Court held that such tax was a governmental function and thus subject to control of the legislature. The Court said, l.c. S.W.2d 203:

"There can be no doubt that the power to tax falls within this class. It is a governmental function inherent in the state. It is argued on behalf of the city that it is not necessary for it to go to a statute for authority for every specific tax which it imposes. In a sense, this is true because as said in the Carpenter Case the general power to impose some kind of taxes is implied from the grant to a city of the right to frame a charter for its government. This follows of necessity because no municipal functions can be carried on without revenue from some source. That implication, however, does not justify the conclusion that the city's power to tax is not subject to the control of the Legislature. Kansas City had wide taxing powers, which had been granted to it by the Legislature, before the Constitution of 1875 was adopted....These powers were not abrogated by the adoption of that Constitution, but were by plain implication recognized as remaining in the city....These special charter provisions were enacted by the Legislature and were 'laws of the State.' Therefore, any new charter continuing such taxing powers would be 'consistent with * * * the laws of the State.' However, the constitutional provision (art. 9, § 16) reads,

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'consistent with and subject to the Constitution and laws of the State,' and the right of the Legislature to change or revoke these powers by statute of general application has been recognized in a number of cases...."

In *Kansas City v. Frogge*, 352 Mo. 233, 176 S.W.2d 498 (1943), the Supreme Court of Missouri held that a city sales tax was a governmental function and stated, 1.c. S.W.2d 503 [9, 10]:

"The state by granting to plaintiff city the right to adopt and frame a charter for its own government did not confer upon plaintiff city the right to assume under its charter all of the powers which the state may exercise within the city, but conferred the right to assume those powers incident to it as a municipality. There are governmental powers, the exercise of which is essential to the prosperity and welfare of the people of a city, yet are not essentially appertaining to city government. These powers, unless delegated by the state, are reserved in the state to be exercised by it...."

See also *Kroger Grocery & Baking Co. v. City of St. Louis*, 341 Mo. 62, 106 S.W.2d 435, 111 A.L.R. 589 (1937).

Thus, a constitutional charter city has sole power to control those things purely corporate. As to governmental functions a constitutional charter city must derive its power from either the Constitution or the legislature and is subject to control of the Constitution or the legislature.

The distinction between corporate and governmental functions was discussed in *Coleman v. Kansas City*, 353 Mo. 150, 182 S.W.2d 74 (1944). The Supreme Court of Missouri said, 1.c. S.W.2d 77:

"....We discussed the matter fully in those cases and our ruling is to the effect that as to matters pertaining to private, local corporate functions the city holds its power independent of control by the General Assembly, but as to governmental functions the State retains control. On this point

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the city's argument is wholly based on the fact that the license taxes are used exclusively for municipal purposes. That fact is not determinative. The distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function which the constitution authorizes the General Assembly to delegate to the city as to municipal taxes but only in a manner 'consistent with and subject to the Constitution and laws of the State.'

It is clear from the above that the power to tax is a governmental function. An earnings tax is not a licensing or regulatory measure but is essentially a revenue measure and is a species of income or excise tax. *Carter Carburetor Corp. v. City of St. Louis*, 356 Mo. 646, 203 S.W.2d 438, 440 [1] (1947); *Lawyers' Association of St. Louis v. City of St. Louis*, Mo. App., 294 S.W.2d 647, 682 (1956).

In *Carter Carburetor Corp. v. City of St. Louis*, supra, St. Louis by ordinance had enacted an earnings tax without enabling legislation. The city claimed that statutory authority was unnecessary because the earnings tax is purely a matter of local or municipal concern as distinguished from state concern so that the city had the unfettered power to impose the tax under its charter citing *Kansas City v. J. I. Case Threshing Mach. Co.*, supra. 1.c. S.W.2d 439. The taxpayer contended the earnings tax is not purely a matter of local concern and so there must be statutory authority or a specific provision in the charter. The Supreme Court of Missouri discussed *Kansas City v. Frogge*, supra, and implied that a charter provision alone would be sufficient to impose the tax but held that the specific charter provision in issue was too indefinite to support the tax. 1.c. S.W.2d 444 [3]. The Court also stated that the earnings tax is not a matter of purely local concern. 1.c. S.W.2d 444 [4].

Therefore, it appears that a constitutional charter city has the power without enabling legislation to specifically provide for an earnings tax. However, for purposes of this opinion it is not necessary to so hold and we do not do so. We are aware of *Walters v. City of St. Louis*, 364 Mo. 56, 259 S.W.2d 377 (1953), affirmed 347 U. S. 231, 74 S.Ct. 505, 98 L.Ed. 660, where the Supreme Court of Missouri said, 1.c. S.W.2d 382:

Honorable R. D. "Pete" Rodgers

"....By the clear implication of that provision, legislative permission to any city or other political subdivision to enact an earnings tax ordinance can only be granted by a general law...."

In that case there was specific legislation purporting to grant power to St. Louis to impose an earnings tax.

The same St. Louis ordinance was under attack in Lawyers' Assn. of St. Louis v. City of St. Louis, supra, where the St. Louis Court of Appeals said, l.c. 683:

"....The plain and rational meaning of this section of the statute does confer upon defendant City the power to impose the earnings tax on the professional earnings of lawyers...."

In neither of the above two cases did the Courts discuss the question whether St. Louis could by specific charter provision provide for an earnings tax without legislation since there was in fact enabling legislation.

The question here is what effect Sections 92.210 through 92.300, supra, have on Kansas City's power to impose an earnings tax.

Section 92.210 authorizes Kansas City to impose by ordinance an earnings tax. However, Section 92.300 requires an amendment to the charter of Kansas City before such an ordinance can be enacted. Section 92.230 limits the amount of the tax to one-half of one per cent a year.

Thus, Kansas City is given the power to tax by the legislature but it must also be granted by the people of Kansas City through a charter amendment. There is no question that Kansas City can impose an earnings tax by specifically providing for the tax with such a charter amendment. It is our opinion, however, that Kansas City has no authority to provide by charter or ordinance an earnings tax in excess of one-half of one per cent a year unless the legislature removes the restriction of Section 92.230, supra.

From the cases and constitutional sections discussed above, it is clear that the earnings tax is a general revenue provision and is a governmental function. Since it is a governmental function, a constitutional charter city can only provide

Honorable R. D. "Pete" Rodgers


for an earnings tax if there is legislative authority or a specific charter provision. Furthermore, the crucial point is that an earnings tax must be consistent with the laws of the state and is subject to the control of the legislature. Section 19, Article VI, supra; and Kansas City v. Threshing Mach. Co., supra.

CONCLUSION

It is the opinion of this office that the City Charter of Kansas City, Missouri, can not be amended by a vote of the people so as to authorize the imposition of a one per cent earnings tax by Kansas City without enabling legislation by the Missouri General Assembly.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Walter W. Nowotny, Jr.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

AUTOMOBILE DEALERS:
AUTOMOBILE INSPECTION:
PRIVATE AUTOMOBILE INSPECTION
PERMITS:
MUNICIPALITIES:

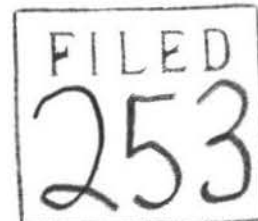
The Superintendent of the Missouri State Highway Patrol may issue private official inspection station permits to automobile dealers, municipalities and other governmental entities having one or more vehicles and/or trailers with a gross weight

in excess of 6,000 lbs. They meet the requirement of having the vehicles to be inspected registered in their names by virtue of qualifying for the registration exemption set out in Section 301.250, RSMo 1959.

OPINION NO. 253

June 18, 1968

Colonel E. I. Hockaday
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Colonel Hockaday:

This is in response to your request for an opinion concerning the issuance of "private official inspection station permits" to automobile dealers under the provisions of Section 304.720.3 RSMo 1967 Cum. Supp.

Section 304.720, in pertinent part, provides that private permits may be issued to persons, organizations and governmental entities "...having registered in his or its name in this state one or more motor vehicles and/or trailers having a gross weight in excess of six thousand pounds and who maintains approved inspection facilities and has qualified personnel. . ."

However, "...private stations shall inspect only vehicles registered or to be registered in the name of the person or organization described on the application for permit."

The statute further provides "No fee shall be charged for a permit issued to a governmental entity."

You have expressed concern as follows:

"It would seem to me that the purposes of the act would be promoted by having car dealers licensed as private inspection stations if they do not choose to become public inspection stations. I am hesitant to authorize such licenses however, because of the use of the words 'registered or to be registered in the name of the person or organization'. Cars held by dealers for sale are not registered in their names."

There is a patent ambiguity in the language of the statute which would defeat an important part of its purpose if literally applied, namely an obvious intent that governmental entities be allowed to act as "private" inspection stations so as to inspect their own vehicles but they can do so only if they have the vehicles "registered" in their own names.

The word "registered" is not defined in Chapter 304 but we believe it clear that it means "registered" for licensing purposes as set out in Chapter 301. No other intelligent application can be made of the word in context.

Governmental entities, under Section 301.260 RSMo, 1959, are exempt from the vehicle registration provisions and therefore they do not have vehicles "registered" in their names. Yet, there is a clear and positive intent expressed in the statute that they be permitted to inspect their own vehicles so that the word "registered" must have some other meaning in this context or else be ignored as not applicable.

The ordinary rules of construction require that each word in a statute be given its plain or technical meaning according to the context in which it appears. But to do so in all respects to the word "registered" in the statute at issue would vitiate important parts of its provisions and defeat some of its major purposes. Consequently, we must look elsewhere to other rules of construction so as to give effect to all of the law.

In *Joplin v. Water Words*, 386 S.W.2d 369, 373, it is said:

" . . . on the principle that the reason of the law should prevail over the letter of the law, courts on numerous occasions, confronted with ambiguous or contradictory language, have adopted a construction which modified the literal meaning of the words, or in extreme cases have stricken out words or clauses regarded as improvidently inserted, in order to make all sections of a law harmonize with the plain intent or apparent purpose of the legislature. . . "

The manifest intent of the legislative provision subject of this opinion is to establish a system of qualified motor vehicle inspection for the protection and welfare of the public. The important thing is to assure the public that such inspection and certification as is done is done in sufficiently equipped facilities by qualified personnel. When that is accomplished the law will be served.

Thus, in those situations obviously falling within the letter of the "private official inspection station" provisions of Section 304.720, private inspection permits may be issued only where the vehicles are registered or to be registered in the name of the person or organization to do the inspecting. But where, as here, there are special exemptions provided from the registration laws which would otherwise prevent a person, organization or governmental entity from qualifying as a private inspection station because vehicles are not technically "registered" in their names, vehicle ownership and/or possession sufficient to qualify for the registration exemption must be regarded as tantamount to "registration" within the meaning of Section 304.720 and "private" inspection permits may be issued to those so qualifying.

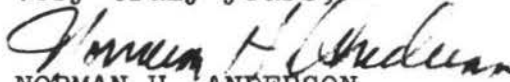
Automobile dealers are exempt from registering vehicles owned or controlled and dealt in by them under the terms of Section 301.250 RSMo, 1959, and consequently meet the "registration" requirement of Section 304.720 RSMo, 1967 Cum. Supp., by virtue of such exemption under the reasoning set out above.

CONCLUSION

The Superintendent of the Missouri State Highway Patrol may issue private official inspection station permits to automobile dealers, municipalities and other governmental entities having one or more vehicles and/or trailers with a gross weight in excess of six thousand pounds. They meet the requirement of having the vehicles to be inspected registered in their names by virtue of qualifying for the registration exemption set out in Section 301.250 RSMo, 1959.

The foregoing opinion which I hereby approve was prepared by my Assistant, Mr. Howard L. McFadden.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

April 11, 1968

#255

Mr. Joseph M. Rowley, Director
Department of Community Affairs
Jefferson Building
Jefferson City, Missouri

FILED
255

Re: Legal Authority of the Missouri
Department of Community Affairs
to participate under Title VIII
of the Housing Act of 1964
(P.L. 88-560; 20 U.S.C. 801, et seq)

Dear Mr. Rowley:

The 74th General Assembly of the State of Missouri created the Department of Community Affairs by the enactment of House Bill No. 129, effective October 13, 1967. This legislation is now included in Chapter 251, RSMo 1967 Supp.

Under the above law the Department is charged with, inter alia, the following duties:

"Exercise the state's responsibility for administering, supervising, coordinating and generally performing the role of state government as set forth in those federal programs concerning community affairs which are assigned to the department by the general assembly or by the governor;"
(251.030(8), RSMo 1967 Supp)

The Department, by and through its director, is authorized to receive and utilize Federal funds in furtherance of its functions (§§ 251.090, 251.190, RSMo 1967 Supp.)

By Executive Order of February 14, 1968, Warren E. Hearnes, Governor of the State of Missouri, officially designated the Department of Community Affairs as the participating state agency, in accordance with § 802(a) (4) of the Housing Act of 1964.

Mr. Joseph M. Rowley

Therefore, it is my opinion that the Missouri Department of Community Affairs has the authority under state law to carry out the proposed activities and to accept Federal funds under Title VIII of the Housing Act of 1964 (Public Law 88-560, 20 U.S.C. 801).

Very truly yours,

NORMAN H. ANDERSON
Attorney General

CANDIDATE: The phrase and letters, "(Mr. Econ CDOSA)" cannot
BALLOTS: appear on the ballot because they are purely de-
ELECTIONS: scriptive.

OPINION NO. 257

May 9, 1968

Honorable James C. Kirkpatrick
Secretary of State
Capitol Building
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in response to your recent inquiry concerning the declaration of candidacy of Beverly Kitching, under Section 120.340 RSMo Supp. Specifically, you inquire whether Mr. Kitching may, in a declaration announcing himself as a candidate for the office of United States Senator, be placed on the ballot as: "Beverly (Mr. Econ CDOSA) Kitching".

It is our understanding that Mr. Kitching is or has been an economics professor and for that reason desires to associate himself with the phrase "Mr. Econ". We understand that the letters "CDOSA" are an abbreviation for "Cut Down on Spending Abroad".

Our Opinion 159, to the Honorable Warren E. Hearnes, dated April 18, 1962 (attached), concluded that the "name" of the candidate cannot include purely descriptive matter such as the degree held or the occupation in which he is engaged. Although the basic section of the Missouri law which was construed in that opinion, that is, Section 120.340, RSMo Supp., has been amended since the opinion, the amendments do not affect the decision. This opinion is in accord with State ex rel. Rainey v. Crowe, 382 S.W.2d 38 (1964), in which the St. Louis Court of Appeals found that the possession of a degree of doctor of medicine by a candidate for office of coroner and a candidate's use of initials "M.D." after his name indicating the degree, did not have the effect of changing his name. The letters "M.D." were found not to be the equivalent of "name", but merely descriptive. That court cited with approval the case of State ex rel. Whetsel v. Murphy, 122 O.S. 620, 174 N.E. 252, wherein it was held to be unlawful to place any characterization or description either before or after the name of the candidate upon the ballot when there was not such identity of the names of

Honorable James C. Kirkpatrick -

two or more candidates as to justify some description which would permit the voters to make an intelligent expression of choice.

The Rainey case was cited in Toigo v. Columbia County Board of Elections, 51 Misc.2d 754, 273 N.Y.S.2d 781 (1966), In the Toigo case the court stated at l.c. 783-784:

" * * * It would be neither fair nor practical to permit the insertion of such titles or degrees with candidates' names, much less the myriad appellations and items of descriptive matter that might logically follow and which election fever and ingenuity would undoubtedly generate."


While we are not here holding that the nickname of a candidate by which he is distinctively known might not be placed on the ballot so as to sufficiently identify the person, the phrase "Mr. Econ" is objectionable in that it is not part of a name but is of a descriptive nature. Clearly, the abbreviation "CDOSA" forms no part of a name and neither it nor the phrase "Mr. Econ" which precedes it, together, or separately, has any better claim to a place on the ballot than those descriptive appellations already rejected by our appellate courts.

CONCLUSION

It is therefore the opinion of this office that, the phrase and letters "(Mr. Econ CDOSA)" cannot appear on the ballot because they are purely descriptive.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosure: Opinion 159 to
Honorable Warren E. Hearnes
April 18, 1962

November 13, 1968

OPINION NO. 258
Answered by letter-Mansur

Honorable Thomas A. David, Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. David:

In your letter of April 9, 1968, you inquire whether points are to be assessed against the chauffeurs' or operators' license of a person convicted of riding as a passenger on a motorcycle without protective headgear as required by Section 302.020, RSMo.

Section 302.020, subsection 3, provides that every person operating or riding as a passenger on any motorcycle upon the highways of this state shall wear protective headgear at all times the vehicle is in motion.

On January 9, 1968, we issued an opinion to the effect that points are to be assessed against the license of a person convicted of operating a motorcycle without wearing protective headgear approved by the Director of Revenue. A copy of that opinion is attached hereto.

We believe that under the statutes and provisions of law a person riding as a passenger on a motorcycle without wearing a protective headgear as required by Section 302.020, supra, is guilty of a misdemeanor and upon conviction points are to be assessed against his license in the same manner as it is against the license of the operator.

Yours very truly,

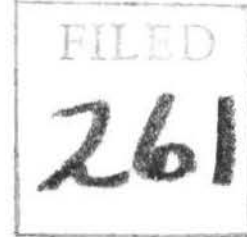
NORMAN H. ANDERSON
Attorney General

NH:msw

Enclosure: Op. No. 119
David, 1-9-68

Opinion No. 261
Answered by Letter (Klaffenbach)

June 14, 1968



Honorable James E. Spain
State Representative, 151st District
Stoddard County
Bloomfield, Missouri 63825

Dear Representative Spain:

We are in receipt of your request for an opinion which states as follows:

"It has been called to my attention that the Missouri Department of Revenue is issuing orders for the suspension and revocation of chauffeurs and operator's license and of license plates under the provisions of the Missouri Point System. Under the provisions of 302.302 RSMo. it is stated that the Director of Revenue shall put into effect a point system for the suspension and revocation of chauffeurs and operator's license. This section makes no provision for the suspension or revocation of the license plates. Under section 302.304 it is stated that the Director shall suspend the operating privileges of a person under certain conditions. This section also does not make any reference to the suspension of the license plates. However, in spite of this, the Department continues to issue order to the Highway Patrol asking that they pick up the license plates. * * * "

We call your attention to Chapter 303, the Motor Vehicle Safety Responsibility Law, and particularly Section 303.150, RSMo, which states:

Honorable James E. Spain

"1. Whenever the director, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the director shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

"2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person, until permitted under the motor vehicle laws of this state, and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

"3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person, until he shall give and thereafter maintain proof of financial responsibility.

"4. Whenever the director suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility." (Emphasis supplied.)

These provisions of Section 303.150 RSMo, clearly require the director of revenue to suspend the registration of all such

Honorable James E. Spain

vehicles.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

PROSECUTING ATTORNEY:
COUNTY BOARD OF EDUCATION:
SCHOOLS:

The prosecuting attorney of a third class county is required to represent a county board of education created under Section 162.111, RSMo Cum. Supp. 1967.

OPINION NO. 263

May 2, 1968

Honorable Maurice B. Graham
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Graham:

This is in response to your request for an opinion which was stated as follows:

"Is the Prosecuting Attorney of a third class county required to represent a County Board of Education created under Section 162.111 Revised Statutes of Missouri."

The duties of a prosecuting attorney are found in Chapter 56, RSMo 1959, the pertinent sections being Sections 56.060 and 56.070 which provide:

"56.060. Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. * * *"
(Emphasis added.)

"56.070. The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded,

Honorable Maurice B. Graham

to the county court or any judge thereof, except in counties in which there is a county counselor. He shall, without fee, give his opinion to any magistrate court, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before the court." (Emphasis added.)

Prior to 1959 the language of Section 56.070 was even more broad in that its first provision was:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, * * * "

Senate Bill 67, Laws 1959, deleted this phrase from Section 56.070, yet there is no reason to consider this as an attempt to narrow the scope of the prosecutor's duties since the committee comments with regard to this part of Senate Bill 67 state that:

" * * * Sections 56.060, 56.070 and 56.100 are here rewritten in two sections omitting the duplications. In one section are consolidated the prosecuting attorney's duties to prosecute and defend actions, and in the other section are consolidated his duties in an advisory capacity . . . "

Thus, the reason for the deletion of the phrase from 56.070 was because of its duplication of the provisions in 56.060.

The underscored provisions of the previously quoted sections along with the pre-1959 wording of Section 56.070 indicate that in the absence of express statutory provisions to the contrary, the prosecuting attorney must represent the county in all matters in which the county is interested or concerned.

Chapter 162, RSMo Cum. Supp. 1967, contains the statutes which regulate the county boards of education. The county board in question was created under Section 162.111, RSMo Cum. Supp. 1967. The duties of this board are set out in Section 162.161, RSMo Cum. Supp. 1967, which provides:

"The county board of education shall

(1) Make or cause to be made and kept current a comprehensive study of each school

Honorable Maurice B. Graham

district of the county. The study shall include:

- (a) The assessed tax valuation of each existing district;
- (b) The number of pupils attending school, average daily attendance, and the population of all districts in the county;
- (c) The location and conditions of school buildings and their accessibility to the pupils;
- (d) The location and condition of roads, highways and natural barriers within the county;
- (e) The high school facilities of the county;
- (f) The conditions affecting the welfare of the teachers and pupils;
- (g) Any other factors concerning adequate facilities for the pupils.

(2) From time to time submit to the state board of education specific plans for the reorganization of school districts of the county. Each plan shall be in writing and shall include charts, maps and statistical information necessary to document properly the plan for the proposed reorganized districts and to provide a comparison of existing districts with proposed reorganized districts.

(3) Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the state board of education for final decision any and all organization questions on which the cooperating boards fail to agree.

(4) Approve the budget prepared by the county superintendent of schools in

Honorable Maurice B. Graham

cooperation with the clerks of the boards of the districts under his supervision and approve the audit, made by the county superintendent, of the expenditures report prepared by the district clerk and submitted for the approval of the state board of education.

(5) Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county.

(6) Designate some person to perform the duties imposed by law on the county superintendent of public schools during any vacancy in his office or in the event of his incapacity to perform his duties. The person designated during the vacancy or incapacity of the county superintendent shall have full power to perform the duties imposed upon him by the county board of education."

These enumerated duties clearly illustrate that the operation of the county board of education is within the interest and concern of the county as required by Sections 56.060 and 56.070.

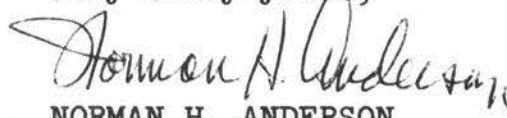
A search of the statutes reveals that there are no express provisions concerning the right of the county board of education to have or acquire counsel.

CONCLUSION

Therefore, it is the opinion of this office that the prosecuting attorney of a third class county is required to represent a county board of education created under Section 162.111, RSMo Cum. Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

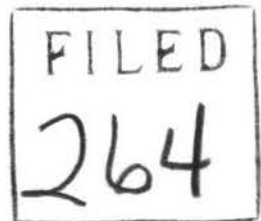
TAXATION:
CITY OF FOURTH CLASS:
OCCUPATIONAL TAX:
DRIVER'S LICENSE FEES:

A city of the fourth class may not charge an occupational tax on driver's license fees collected by agents of the Department of Revenue who are acting under the authority of Section 136.055, RSMo Cum. Supp. 1967.

OPINION NO. 264

May 14, 1968

Mr. Thomas A. David, Director
Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. David:

This is in response to your request for an opinion concerning whether or not a city of the fourth class may charge an occupational tax on driver's license fees collected by agents of the Department of Revenue who are acting under the authority of Section 136.055, RSMo Cum. Supp. 1967.

Section 136.055 provides:

"1. Any person who is selected or appointed by the state director of revenue to act as an agent of the department of revenue, whose duties shall be the sale of motor vehicle licenses and the collection of motor vehicle sales and use taxes under the provisions of section 144.440, RSMo, and who receives no salary from the department of revenue shall be authorized to collect from the party requiring such services additional fees as compensation in full for all services rendered on the following basis:

- (1) For each motor vehicle or trailer license sold, renewed or transferred--forty cents;
- (2) For each application or transfer of title--forty cents;
- (3) For each chauffeur's, operator's or driver's license--forty cents;

Mr. Thomas A. David

(4) No notary fee or other fee or additional charge shall be paid or collected.

2. This section shall not apply to agents appointed by the state director of revenue in any city where the department of revenue maintains an office."

The power of fourth class cities to levy the type of tax in question is found in Section 94.270, RSMo Cum. Supp. 1967. This statute enumerates many types of businesses and occupations, none of which expressly include an agent of the Department of Revenue who is selling driver's licenses. One of the general occupations enumerated is that of "merchants of all kinds". This phrase has been interpreted previously by the Missouri Supreme Court in the case of City of Ozark vs. Hammond, (Mo. 1932), 49 S.W. 2d 129, 131, wherein the court states:

"A merchant is one who is engaged in the purchase and sale of goods; a trafficker; a trader."

An agent of the Department of Revenue operating under Section 136.055 is certainly not engaged in the "purchase and sale of goods". He makes no purchases and merely serves as an extension of the Department of Revenue. The only other provision of Section 94.270 to which a fourth class city could look for authority to levy this tax would be the catch-all phrase "and all other business, trades and vocations whatsoever". A phrase such as this was considered in the case of City of St. Louis vs. Laughlin, (Mo. 1872), 49 Mo. 559, which involved an attempt by the City of St. Louis to impose a license tax upon lawyers before they were allowed to practice or engage in their professional business. The court, in holding that lawyers were not included within the provision, stated their reasoning as follows (page 564):

"In the present case the charter specifically enumerates the classes of persons intended to be taxed, and the sweeping words 'all other business, trades, vocations or professions', we do not think can be made to include persons not of the same generic character or class. In specifying and enumerating the trades and professions to be taxed, it was intended to limit the taxation to them or to persons engaged in similar trades or occupations . . ."

Mr. Thomas A. David

In construing Section 94.270 we must consider the rule set forth by the Missouri Supreme Court in City of St. Charles vs. St. Charles Gas Co., (Mo. 1945), 185 S.W. 2d 797, and recited in City of Bollivar vs. Ozark Utilities Co., (Mo. 1945), 191 S.W. 2d 368, at 370, as follows:

"* * * But since 1889 our statutes relating to municipalities have contained this delimitating declaration of policy (Ex parte Lockhart, 350 Mo. 1220, 171 S.W. 2d 660): "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute." Mo.R.S.A. §7440. This plain statutory declaration of policy is applicable to all cities and "it clearly places a limitation upon the power to tax occupations." Pierce City v. Hentschel, Mo. Sup., 210 S.W. 31, 32. Unless the business or occupation is specifically enumerated as one subject to a license tax, the general rule is that the municipality has no authority to so tax it. Keane v. Strodtman, 323 Mo. 161, 18 S.W. 2d 896; Siemens v. Shreeve, supra.'" (Emphasis added.)

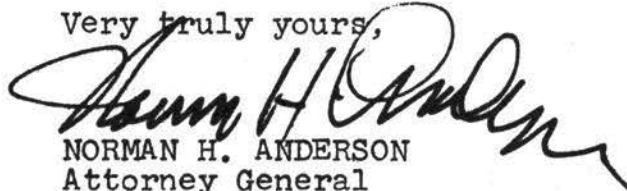
The agent provided for in Section 136.055 is clearly not of the same generic character or class as the enumerated businesses and occupations of Section 94.270. The obvious distinction being that this agent is selling an item whose cost and market is completely controlled by statute i.e., Chapter 302, RSMo 1959, as amended.

CONCLUSION

Therefore, it is the opinion of this office that a city of the fourth class may not charge an occupational tax on driver's license fees collected by agents of the Department of Revenue who are acting under the authority of Section 136.055, RSMo Cum. Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

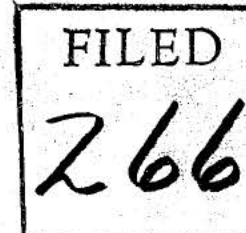

NORMAN H. ANDERSON
Attorney General

**FEDERAL-STATE AGREEMENTS:
ELEMENTARY AND SECONDARY
EDUCATION ACT OF 1965:**

**Certification of Application by
Missouri State Board of Education
for federal grant under Title V,
Elementary and Secondary Education
Act of 1965, PL 89-10.**

**Opinion No. 266-68
Answered by letter
DeFec**

April 29, 1968



**Mr. Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson City, Missouri 65101**

Dear Commissioner Wheeler:

Per your request, we have reviewed the amended parts of the Missouri Application for a federal grant to strengthen the Missouri State Department of Education under Title V, PL 89-10. These amended provisions to be known as Application No. 3, Fiscal Year 1968.

We hereby certify that the Missouri State Board of Education is the agency of the state primarily responsible for state supervision of public, elementary and secondary schools and is the agency most nearly meeting the definition of "state educational agency" in Section 601(K) of Public Law 89-10; that the State Board has the authority under state law to submit and administer the programs, projects and activities set forth in the amendment to the State Application; and that all the provisions of the amendments to the State Application are consistent with state law.

We have executed the appropriate certificate on the original copy of the amended Application and return that copy herewith.

Yours very truly,

**NORMAN H. ANDERSON
Attorney General**

**By: Louis C. DeFec, Jr.
Assistant Attorney General**

LCDJr:rs

Enc.

DEPARTMENT OF AGRICULTURE:
MISSOURI GRAIN WAREHOUSE LAW:
GRAIN SAMPLERS:

A private corporation may not be authorized to accept and retain fees for collecting samples for inspection and grading of grain by the Department of Agriculture pursuant to the provisions of the Missouri Grain Warehouse Law.

Such samples must be collected by an employee of the state and the fees paid to the Collector of Revenue and deposited in the State Treasury.

OPINION NO. 267

December 19, 1968

Mr. Dale Stanton, Director
Grain Warehouse Division
Department of Agriculture
Jefferson Building
Jefferson City, Missouri



Dear Mr. Stanton:

This is in response to your request for an opinion on the question of whether a private corporation may accept and retain fees for collecting samples of grain for the inspection and grading of grain under the Missouri Grain Warehouse Law. Your question arises in view of the fact that a corporation is now installing automatic grain samplers in elevators in Missouri and, as stated in your opinion request:

"They install this automatic sampler on a leased basis, and include in the lease provisions for their organization to not only install the automatic sampler, but to maintain the sampler, to provide the employee, they will take the grain from the sampler and transport the sample to an inspection agency for official grade, and the results of the grade is returned to the elevator operator."

It is apparent that under this arrangement the corporation collecting the sample does not purport to be a sampler appointed by the Commissioner of Agriculture, paid a salary by the state and who performs services for which a fee is paid to the State Collector of Revenue, but is a corporation which is to be paid for its services by the owner of the grain which payment is to be kept by the corporation.

Section 411.030, RSMo Cum. Supp. 1967, provides that the Department of Agriculture shall have the exclusive right to officially inspect and grade all grains where inspection points of the Department are established. Section 411.070, RSMo Cum. Supp. 1967, provides that the Commissioner shall supervise the handling, sampling, inspection, weighing and storage of grain in public warehouses, and employ, fix the salaries and pay all necessary personnel required to administer, execute and perform the duties required by the provisions of the Missouri Grain Warehouse Law. Section 411.150, RSMo Cum. Supp. 1967, is as follows:

Mr. Dale Stanton

"1. The commissioner shall have full power to fix the fees for sampling, inspection, weighing, protein or other chemical analysis, and moisture testing or for additional services of whatever nature consistent with the provisions of sections 411.010 to 411.701, which fees shall be regulated in such manner as will, in the judgment of the commissioner, produce sufficient revenue to meet the necessary expenses of the services of sampling, inspection, weighing, chemical analysis or moisture testing, and for administration and clerical work in connection therewith.

2. All fees shall be paid to the collector of revenue and thereupon deposited in the state treasury to the credit of the grain warehouse fund, and from such fund appropriations may be made for the purposes of paying salaries and expenses necessary for complying with the provisions of sections 411.010 to 411.701.

3. At the end of each fiscal period, all money remaining in the fund herein established in excess of one hundred thousand dollars shall be transferred by the state treasurer and become a part of the general revenue fund."


The foregoing statutory provisions show the legislative intent to be that the person taking grain samples must be a state employee; that the fees for taking such samples must be fixed by the commissioner; and, that such fees must be paid to the collector of revenue and deposited in the state treasury. Therefore, it would not be possible under our statutes to authorize a private corporation to accept fees to be retained by the corporation for furnishing grain samples.

CONCLUSION

It is the opinion of this office that a private corporation may not be authorized to accept and retain fees for collecting samples for inspection and grading of grain by the Department of Agriculture pursuant to the provisions of the Missouri Grain Warehouse Law. Such samples must be collected by an employee of the state and the fees paid to the Collector of Revenue and deposited in the State Treasury.

The foregoing opinion, which I hereby approve, was prepared by my assistant, L. J. Gardner.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

RECORDER OF DEEDS:
TO RECORD INSTRUMENTS
WITH PHOTO-COPY DESCRIPTIONS:
WHEN:

1967 and Section 442.380 RSMo.
recorded.

An instrument conveying or affecting real estate with photostatic land description taped or stapled thereto meeting requirements of Section 59.330 RSMo. Cum. Supp. 1959 as to recordability shall be

Opinion No. 269-68

June 18, 1968

Honorable H. Dean Whipple
Prosecuting Attorney
Laclede County
Lebanon, Missouri 65536



Dear Mr. Whipple:

This office is in receipt of your request for a legal opinion in which you advise that the Recorder of Deeds of your county is receiving instruments for recording consisting of a printed form of deed or other instrument upon which the land description has been inserted by taking a photostatic xerox or various other types of copies from another instrument and taping or stapling the description thus taken in the appropriate space of the printed form. The recorder questions whether an instrument with such a description is an original one which should be recorded.

The specific inquiry for which an opinion has been requested is:

"Is an instrument presented that has a photostatic copy of a legal description taped or stapled to a printed form, a proper instrument to be accepted by a Recorder of Deeds for recording as an original?"

In this connection we call attention to Section 59.330 RSMo. Supp. 1967 and Section 442.380 RSMo. 1959 providing what shall be recorded.

Section 59.330 reads in part as follows:

"It shall be the duty of recorders to record:
(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments in writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices * * *"

Honorable H. Dean Whipple

Section 442.380 reads as follows:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

Neither said sections, nor any others, provide the description of real estate shall not be made upon a separate sheet by writing, printing, or various copying methods and attached to the instrument conveying or affecting real estate. We are unable to find any Missouri appellate court decision holding that such an "attached" land description is not a valid description, or that such an instrument of this nature is insufficient to convey title, or to affect the land described in any manner, or that it cannot be recorded.

In the absence of any such legal restrictions or prohibitions, as mentioned above, it is our view that it is permissible to attach land descriptions to such instruments without affecting their validity.

In an opinion of this office written for Senator Earl R. Blackwell, on June 8, 1965 (No. 83-65), it was held that when an otherwise properly recordable instrument is presented and there are maps, plats, surveys, or other documents attached, it is the duty of the recorder to record the instrument regardless of whether the maps, surveys or other documents are affixed with the seal of a land surveyor. A copy of said opinion is enclosed for the reason it sustains our position that a land description may be attached to an instrument without affecting its legality or recordability. Consequently, a land description may be made by means of any photographic, xerox or other copying device from another instrument and the copies description may be attached by taping or stapling to the instrument of conveyance, and once it has been so attached it becomes a part of it the same as if the description had been written or typed on the instrument.

The objection that an instrument with an "attached" land description is not an original is not a valid one. We have pointed out above that when the copied description has been firmly attached to the instrument, such description becomes a part of it as if it had been written or typed on, rather than attached to the instrument. When an instrument with an "attached" description meeting the requirements of Sections 59.330 and 442.380 as to what shall be recorded is presented to the Recorder of Deeds for recording, it is his duty to record same in the appropriate records of his office.

Honorable H. Dean Whipple

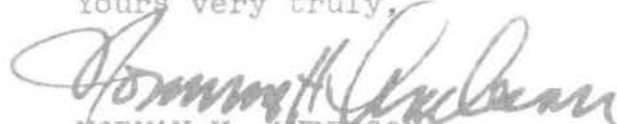
We are enclosing Opinion No. 81 rendered May 26, 1941 to John P. Sherrod which holds that the Recorder of Deeds is a ministerial officer and that it is his duty to record instruments presented to him which are proved or acknowledged according to law and that he does not pass on the legality of such instruments.

CONCLUSION

Therefore, it is the opinion of this office that when an instrument conveying or affecting real estate, having a photostatic copy of the land description attached by taping or stapling thereto which instrument meets the requirements of Section 59.330 RSMo. Supp. 1967 and Section 442.380 RSMo. 1959 as to recordability is presented for recording, it is the duty of the Recorder of Deeds to record such instrument.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosures:

Opinion No. 83, 6/8/65, Blackwell
Opinion No. 81, 5/26/41, Sherrod

TAXATION:
COUNTY COURT:
EXEMPTIONS FROM TAXES:

Property owned by a corporate unit of the Girl Scouts of America which is used regularly, completely and exclusively for charitable purposes, is exempt from taxation under the constitution and laws of the state.

OPINION NO. 270

May 14, 1968



Honorable Robert S. Drake, Jr.
Prosecuting Attorney
P. O. Box 26
Warsaw, Missouri 65355

Dear Mr. Drake:

This is in response to your request for an opinion regarding the tax status of the Girl Scout Camp in Benton County, which is known as Camp Oakledge.

It is our understanding that the camp consists of 250 acres and is owned by the Kansas City Area Council of Girl Scouts which is an incorporated unit of the Girl Scouts of America. We are further informed that in the Summer of 1966, 523 girls attended 12 day Established camp sessions and an additional 50 were there for 7 day Sampler sessions. Over 600 girls used the facilities for 2 or 3 day troop camp in the course of the year. We also understand that no revenue is derived from any commercial activities, although certain fees are charged for the sessions. The policy is stated to be: "charge only enough to defray the cost of operation;" and as a consequence, in 1966 the income was substantially less than the expense of operation.

The operation of the camp and the structure of the organization for all purposes appears to be quite similar to that of the St. Louis Council of the Boy Scouts of America and their use of the Beaumont Reservation as considered in St. Louis Council, Boy Scouts of America v. Burgess et al, 240 S.W.2d 684 (1951). In that case the Supreme Court, en Banc, relied upon the provisions of Section 6, Article X, of the Constitution and Section 137.100 RSMo.

Section 6, Article X, of the Constitution states as follows:

Honorable Robert S. Drake, Jr. -

"All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Section 137.100(5), states:

"All property, real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes."

It appears therefore from the information that we have that the camp is used for scouting purposes on an actual and regular basis and that this user is exclusive and consists of all the area involved within the holding of the Burgess case. Based upon these principles we hold that the property involved is within the cited statutory and constitutional exemptions. Your attention is also called to a prior opinion of this office which is attached, Opinion No. 28, dated December 20, 1935, directed to Mrs. Clifford Fischer. In that opinion we held that certain lots belonging to a Council of the Girl Scouts of America, as well as the belongings thereon, were exempted from taxation by the State of Missouri under the former Section 6, Article X, of the Constitution, for the reason that they were being used exclusively for charitable purposes.

Insofar as the present assessments are concerned, we have held consistently that a county court has jurisdiction to

Honorable Robert S. Drake, Jr.-

correct taxes which have been erroneously extended against exempted property. The county court may also in this instance, acting upon the premises above stated, correct whatever assessments are on the tax rolls at the time and reduce them to zero. The opinions I refer to and which are attached, are respectively: Nos. 105, dated February 18, 1964, to the Honorable Herman G. Kidd; 199 dated June 12, 1963, to the Honorable Herman G. Kidd; and 66 dated January 15, 1944, to the Honorable J. F. Newton.

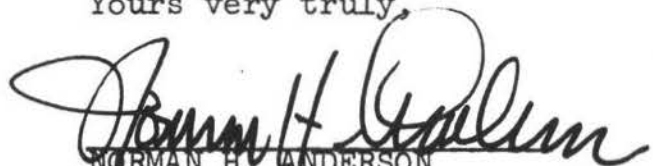
The exemption will continue of course, presuming no change in the law, as long as the user of the land is continuous, complete, and exclusively for charitable purposes.

CONCLUSION

It is the opinion of this office that property owned by a corporate unit of the Girl Scouts of America which is used regularly, completely and exclusively for charitable purposes, is exempt from taxation under the constitution and laws of the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Enclosures (opinions):
No. 28, Fischer, 12-19-35;
No. 104, Kidd, 2-18-64;
No. 199, Kidd, 6-12-63; and
No. 66, Newton, 1-15-44.

ELECTIONS: A declaration of candidacy which contains a mis-
CANDIDATES: statement of the office being sought may not be
corrected or amended subsequent to the filing dead-
line of five p.m. on the last Tuesday in April pre-
ceding the primary election.

OPINION NO. 274

May 15, 1968

Honorable James C. Kirkpatrick
Secretary of State of Missouri
Capitol Building
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion which was
stated as follows:

"During the last few days of filing for
state office we had several instances in
which an individual filed for state rep-
resentative for a district in which he
does not reside.

Now some of these people are requesting
that their declaration be corrected by
placing their candidacies in the district
required by their residence. * * * "

Section 120.340, RSMo Cum. Supp. 1967, provides in part as
follows:

"The name of no candidate shall be printed
upon any official ballot at any primary
election unless the candidate has on or
before five p.m. prevailing local time on
the last Tuesday of April preceding the
primary filed a written declaration, as
provided in Sections 120.300 to 120.650,
stating his full name, residence, office
for which he proposes as a candidate, the
party upon whose ticket he is to be a
candidate, that if nominated and elected
to the office he will qualify, and the
declaration shall be in substantially the
following form. . ." (Emphasis added.)

Honorable James C. Kirkpatrick

Enclosed is a copy of Opinion No. 18, Collins, 5/25/50, which concerns the application of Section 120.340 to a person who fails to state in his declaration the office for which he is filing. That opinion rules that where a declaration of candidacy is filed but the office is left blank that such declaration is ineffective and the name of the person filing such declaration should not be printed on the ballot.

In the question which you present the person has misstated the office for which he is a candidate. We believe that a misstatement of the office sought makes the declaration of candidacy equally ineffective as does a nonstatement of the office sought.

Also enclosed is a copy of Opinion No. 54, Long, 6/8/38, which considered a situation where a person filed for the office of Justice of the Peace, but failed to state the township in which he was a candidate. That opinion involved an interpretation of Section 10257, RSMo 1929, which for purposes of the present opinion was exactly the same as previously quoted Section 120.340. The ruling there was that the failure of a candidate for Justice of the Peace to state in his declaration the particular municipal township in which he desires to become a candidate is fatal to his declaration, and the county clerk should not cause his name to be printed on the primary ballot.

Section 120.340 is mandatory in its requirement that a declaration of candidacy be filed prior to five p.m. on the last Tuesday of April preceding the primary. There are no exceptions made for correcting or amending the declaration of candidacy subsequent to the filing deadline.

The Texas Supreme Court has recently considered a situation which was very much similar to the subject of this opinion. In the Texas case a Mr. Lacy filed for Justice of the Peace and stated an address for his legal residence which happened to be outside the requisite Justice of the Peace precinct. Subsequent to the deadline for filing applications, Lacy attempted to claim mistake and filed an affidavit which allegedly proved his legal residence to be within the precinct. The Texas Supreme Court, in holding that Lacy was ineligible for a place on the ballot, stated:

"[3] In the case here the Committee did not attempt to determine any fact question but accepted Mr. Lacy's statement as to his place of residence on its face value. Actually what Mr. Lacy is saying here is that his solemnly acknowledged statement given to the Committee for the purpose of

Honorable James C. Kirkpatrick

placing his name on the ballot as a candidate was false. He was not misled in any way in making that statement. If it was false Mr. Lacy must have known so at the time. The Committee is not authorized to question this statement of fact nor will Mr. Lacy be allowed to do so after the deadline has been passed and the machinery for preparation of the ballots has been set in motion."

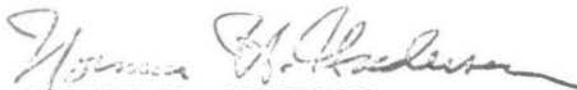
Canady vs. Democratic Exec. Com. of Travis County, (Tex. 1964), 381 S.W. 2d 321, 324.

CONCLUSION

Therefore, it is the opinion of this office that a declaration of candidacy which contains a misstatement of the office being sought may not be corrected or amended subsequent to the filing deadline of five p.m. on the last Tuesday in April preceding the primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard E. Dorr.

Very truly yours,



NORMAN H. ANDERSON
Attorney General

Enc.--Op. No. 18; Collins; 5/25/50
Op. No. 54; Long; 6/8/38

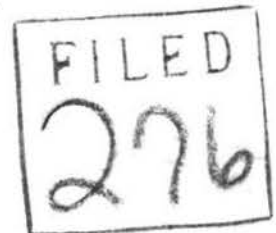
TEACHERS:
SCHOOLS:
SCHOOL BOARDS:
UNIONS:
LABOR UNIONS:
CONTRACTS:
PUBLIC CONTRACTS:

(1) Teachers may join in groups, including unions, for the purpose of making proposals to school boards, but the boards cannot enter into binding agreements with such groups; (2) School boards may consider teacher group proposals and are not precluded from acting favorably upon such proposals to the extent that they do not conflict

with applicable law or superior regulation; (3) School boards may enter into binding contracts with individual teachers which extend beyond the term of the school board, provided that the individual contract is not for an unreasonable term, in bad faith, fraudulent or in conflict with any statutory provisions or superior regulations; (4) No school board can enter into a contract which involves more than one teacher; (5) The school boards exercise a function of the sovereign and as such cannot delegate and cannot bargain or contract away any sovereign powers or duties.

OPINION NO. 276

December 12, 1968



Honorable Robert L. Prange
State Senator, 14th District
12714 Bellefontaine Road
St. Louis, Missouri 63138

Dear Senator Prange:

This is in response to your opinion request in which you raise the following questions:

"1. Can school boards negotiate with any teacher group and can a school board enter into an agreement or contract with a group of teachers or can a board only establish a policy by a vote of the board?"

"2. As a school board is reorganized each year after the annual election can a board enter into a binding contract involving more than one teacher for a period of more than one year?"

"3. Can a school board negotiate and contract away the right to establish policy for the operation of public schools?"

Honorable Robert L. Prange -

We understand that you are concerned with school boards in general and without particular limitation to any type of school district.

Our labor organization statutes, Section 105.500 to 105.530, RSMo Supp. 1967, were first enacted in 1965 and amended in 1967.

Section 105.500, RSMo Supp. 1967, defines "public body" as follows:

"(3) 'Public body' means the state of Missouri, or any officer, agency, department, bureau, division, board or commission of the state, or any other political subdivision of or within the state."

This office has previously concluded in Opinion No. 68, dated May 6, 1966, to the Honorable Howard M. Garrett (copy enclosed), that a school district is a political subdivision within the meaning of the above section.

However, Section 105.510, RSMo Supp. 1967, provides:

"105.510. Public employees may join labor organizations and bargain collectively-- exceptions--not to be discharged or discriminated against. -- Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization." (Emphasis added).

Thus, the legislature expressly excluded public school teachers from the provisions of the labor organization statutes, Sections 105.500 to 105.530. This is not to say, however, that groups of teachers have no right to organize and to present their proposals to a public body.

Honorable Robert L. Prange -

Prior to the enactment of Sections 105.500 to 105.530, we recognized that our constitution authorized some governmental employees to legally organize and to become members of a labor union. We reached this conclusion in Opinion No. 68, dated March 15, 1957, to the Honorable W. H. S. O'Brien, copy enclosed. We concluded in that opinion that: the employees of a county highway commission may legally organize and become members of the labor union; a county court lacks the power to enter into collective bargaining agreements binding on the county with a labor union representing employees of a county highway commission; a county court lacks the power to enter into and execute a contract of employment with a labor union representing employees of a county highway commission.

Additionally, in this respect we note that Article I, Section 29 of the Missouri Constitution provides:

"That employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

This article, however, was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry and does not apply to public employees. City of Springfield vs. Clouse, 206 S.W. 2d 539 (1947). The court in Clouse, however, held that although it made no difference whether or not the public employees were employed in a corporate or proprietary capacity, the ruling did not mean that public employees have no right to organize since there was nothing improper in the organization of municipal employees into labor unions but that entering into a binding agreement with public employees was an entirely different matter.

The right of teachers to organize is found in Bergman v. Board of Education, 230 S.W. 2d 714 (1950), in which the court cited Clouse with approval.

In answer to your first question we conclude that teachers have the legal right to organize labor unions in the same manner as do employees of private industry but that as public employees they do not have the right to bargain collectively and negotiate in the same manner as private employees nor do they have the rights granted certain public employees under Sections 105.500 to 105.530, RSMo Supp. 1967. It is our interpretation, and we hold, that such teachers may present proposals to the school boards but for the reasons stated in Clouse cannot collectively enter into agreements or contracts with boards. The boards would not be precluded from establishing a policy, regulation or resolution which was favorable to the proposal of a teacher group in so far, of course, as the same did not conflict with statutory provisions or delegate authority vested in the boards.

Honorable Robert L. Prange -

We note by comparison that even those employees who are within the provisions of the labor organization statutes have not been granted the full right of collective bargaining as it is commonly known. In this respect we attach for your information our Opinion No. 373, dated October 17, 1967, addressed to the Honorable Corley Thompson, Jr.

It is quite evident that such teachers do not have the right to strike, and that the labor organization statutes do not grant any such right even to employees covered by that law. Section 105.530, RSMo Supp. 1967.

In answer to your second question concerning whether or not the board can enter into a binding contract involving more than one teacher for a period extending beyond the term of the school board we refer you to our opinion, attached, No. 304, dated November 9, 1965, to the Honorable Gerald Kiser. Although that opinion dealt with the county court and their authority to contract beyond their term, the reasoning is applicable to this point. That opinion concluded that the contract may be for a period beyond the term of the governing body provided it is not an unreasonable period, is not in bad faith or is not fraudulent.

Similarly in Tate vs. School Dist. No. 11 of Gentry County, 23 S.W. 2d 1013 (1929) the Supreme Court of Missouri adopted the "prevailing weight of judicial authority on the subject", stating at 1.c. 1021:

" . . . 'In the absence of a statutory provision limiting, either expressly or by implication, the time for which a contract for employment of a school-teacher may be made to a period within the contracting schoolboard's or officers' term of office, such board or officers may bind their successors in office by employing a teacher or superintendent for a period extending beyond their term of office, or for the term of school succeeding their term of office, provided such contract is made in good faith, without fraud or collusion, and for a reasonable period of time; . . . '"

This office previously held that a school board may contract with a teacher for a period of more than one year. See attached Opinions No. 24, dated May 1, 1933, to the Board of Education, City of Columbia, and No. 83, dated May 9, 1941, to the Honorable Robert W. Smart. Insofar as concerns the applicable statutory limitations on the term of years or otherwise for teacher employment contracts, the boards may be limited.

In this respect, we note that the various statutory provisions vary.

Honorable Robert L. Prange -

Section 168.191, RSMo Supp. 1967, with respect to superintendent and teacher contracts in high school districts (Class 1 counties) provides in part:

"* * * The school board of such high school districts may enter into contracts, for a period not to exceed two years, with school teachers if the contracts are made upon the recommendation of the superintendent of schools of the high school district, but the contracts thus approved by the superintendent of schools shall not extend for a period of more than one year beyond the time for which the superintendent was employed to supervise the public schools of the high school district. This law shall not invalidate or repeal any other law of this state relating to the employment of teachers, principals or superintendents of public schools"

Section 168.201, RSMo Supp. 1967, with respect to superintendent and employee contracts in urban districts provides:

"The school board in urban districts may employ and contract with a superintendent for a term not to exceed four years from the time of making the contract, and may employ such other servants and agents as it deems necessary, and prescribe their powers, duties, compensation and term of office or employment which shall not exceed two years. It shall provide and keep a corporate seal."

We further note that Section 168.101, RSMo Supp. 1967, provides in part:

"The school board, at a regular or special meeting called after the annual school meeting, may contract with and employ legally qualified teachers for and in the name of the district. The contract shall be made by order of the board; shall specify the number of months the school is to be taught and the wages per month to be paid; shall be signed by the teacher and the president of the board, and attested by the clerk of the district when the teacher's certificate is filed with him. The clerk shall return the certificate to the teacher at the expiration of the term. The certificate must be in force for the full time for which the contract is made. * * *"

Honorable Robert L. Prange -

In Tate, supra, the court in construing this statute held, at l.c. 1020:

"* * *The legislative grant of power to the board of directors of a school district to employ, and to contract with, legally qualified teachers, is made general by the statute. No express limitation is put upon the grant of power by any language of the statute; nor is any limitation upon the power granted to be reasonably implied from the language and context of the statute. The statute does not limit, or undertake to limit, either expressly or impliedly, the period of employment of a teacher to the single and particular school year in which the contract of employment is made by the school district board of directors. * * *" (Emphasis added).

We recognize that the St. Louis Court of Appeals in Magenheim vs. Board of Education, 347 S.W. 2d 409 (1961), stated that the contract between a "Town School District Board and a school teacher is for one year". Magenheim, however, considered the question of teacher tenure and we view this statement by the court as merely obiter dictum and in conflict with the Supreme Court holding in Tate which we regard as controlling.

Going further, however, into the nucleus of your second question, and that is with regard to whether or not a binding contract may be entered into which involves more than one teacher, we conclude that such a contract would not be valid or proper. The general statutory provisions contained in Chapter 168 and particularly Section 168.101, RSMo Supp. 1967, with respect to the employment of teachers and their contracts is indicative that only individual contracts are contemplated, each by its own terms, taking into consideration the employment rights and limitations of the individual teacher.

In answer to your second question, then, school boards may enter into binding contracts with individual teachers which extend beyond the term of the school board, provided that the individual contract is not for an unreasonable term, in bad faith, fraudulent or in conflict with any statutory provisions or superior regulation.

In answer to your third question concerning whether or not a school board may negotiate and contract away their right to establish policy for the operation of public schools, we conclude that it is inherent in the framework of the government that the governing body has all the duties and obligations set out by statute and cannot contract or delegate any part of their sovereign function. This conclusion is well established by Springfield vs. Clouse, supra, which was cited and quoted extensively in the attached opinions.

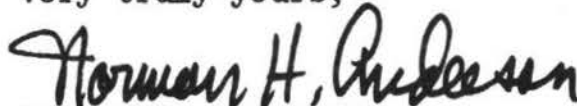
Honorable Robert L. Prange -

CONCLUSION

It is the opinion of this office that: (1) Teachers may join in groups, including unions, for the purpose of making proposals to school boards, but the boards cannot enter into binding agreements with such groups; (2) School boards may consider teacher group proposals and are not precluded from acting favorably upon such proposals to the extent that they do not conflict with applicable law or superior regulation; (3) School boards may enter into binding contracts with individual teachers which extend beyond the term of the school board, provided that the individual contract is not for an unreasonable term, in bad faith, fraudulent or in conflict with any statutory provisions or superior regulations; (4) No school board can enter into a contract which involves more than one teacher; (5) The school boards exercise a function of the sovereign and as such cannot delegate and cannot bargain or contract away any sovereign powers or duties.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

enc: Op. No. 24, Board of Education, 5/1/33
Op. No. 83, Smart, 5/9/41
Op. No. 68, O'Brien, 3/15/57
Op. No. 304, Kiser, 11/9/65
Op. No. 68, Garrett, 5/6/66
Op. No. 373, Thompson, 10/17/67

POLITICAL SUBDIVISION: A public water supply district under
PUBLIC WATER SUPPLY DISTRICT: Chapter 247, RSMo 1959, may employ
ASSESSED VALUATION: the pension plan under Section 67.200,
PENSION PLAN FOR EMPLOYEES: RSMo Cum. Supp. 1967, if its assessed
valuation is \$40,000,000 or more.

OPINION NO. 279

August 22, 1968

Honorable Donald L. Manford
State Representative, 18th District
9409 Oakland Avenue
Kansas City, Missouri 64138



Dear Representative Manford:

This is in answer to your opinion request to us regarding Section 67.200, RSMo Cum. Supp. 1967 (S.B. 14 and 30, 74th General Assembly), in which you stated:

"As I understand the considerations, the Board of Directors of Jackson County Public Water Supply District No. 1 is making inquiry relative to the establishment of the pension system as authorized under Senate Bills No. 14 and No. 30 considered by the 74th General Assembly in the year 1967. Will you please advise as to whether the present status of the Jackson County Public Water Supply District No. 1 is eligible for a pension plan under the existing Missouri Statutes.

There seems to be concern as to whether the present general obligation bonds of the water district are to be considered in determination of the district's qualification as to total assessed valuation when weighed together with the other assessed valuation of the area. And finally, what effect would result if the political subdivision's assessed valuation fell below the qualifying amount of \$40,000,000. This last factor is mentioned, of course, because of the anticipated fluctuation of the assessed valuation within the political subdivision from year to year."

Section 67.200 reads:

Honorable Donald L. Manford

"1. Any political corporation or subdivision of this state, now having or which may hereafter have an assessed valuation of forty million dollars or more, except counties of the second class having a population in excess of sixty-five thousand, which adjoins a county of the first class with a charter form of government, which does not now have a pension system for its officers and employees adopted pursuant to state law, may provide by proper legislative action of its governing body for the pensioning of its officers and employees and the widows and minor children of deceased officers and employees and to appropriate and utilize its revenues and other available funds for such purposes.

2. In adopting a pension plan such counties, other political corporations or political subdivisions may provide for different benefits and requirements for elected officers and appointed officers and employees."

Provisions relating to water supply districts are found in Chapter 247, RSMo 1959. There is no question but that such a district is a political subdivision (Constitution of Missouri, Article X, Section 15; Attorney General Opinion No. 109, rendered to Honorable Don R. Ferry, April 25, 1967, enclosed herein); the district will be eligible to utilize the new employee pension statute if its "assessed valuation" is forty million dollars or more.

Under Section 247.450, RSMo 1959, a public water supply district can levy and collect ad valorem taxes on "all taxable tangible property" in the district, as shown by the "last completed assessment". Section 247.460.

We are advised that before 1961, the then larger district voted general obligation bonds payment of a portion of which was assumed by Kansas City in annexation proceedings under the statutes. It is our understanding that the lawyer for the district contends that under the provisions of Section 247.130, RSMo, all of the taxable tangible property in the territory of the district as it existed prior to the change in district boundaries by annexation of part of the territory to Kansas City would be liable to a

Honorable Donald L. Manford

tax levy to pay for bonds issued by the district as it existed prior to such annexation, if Kansas City should default on payment of the bonds such city agreed to pay as part of the settlement between the district and the city.

We deem it unnecessary to determine whether this contention is correct or whether taxable tangible property in the territory annexed to Kansas City which was formerly a part of the water district would be liable only if Kansas City does default on the bonds it agreed to pay and if the district as it presently exists could not raise sufficient tax monies to pay for such bonds, because it is clear there is only one Jackson County Public Water Supply District No. 1 in existence at present with definite boundaries.

The fact that taxable tangible property not in a water supply district might be subject to a tax to make payment on bonds if a contingency occurs does not affect the fact that the property which might be subject to a tax levy to pay bonds upon the occurrence of the contingency is not within the district, and is not considered in determining the assessed valuation of such district. We have examined the decree in Case No. 83533, Circuit Court of Jackson County, Missouri, entered July 28, 1961, and find that while a portion of the total bond obligation of the formerly larger district was assumed by the city when some of the district's area was annexed, that nevertheless the decree makes it clear (page 7) that "all of the territory of the district which has been included by annexation within the corporate limits of the city, effective January 1, 1961, and January 1, 1963 . . . is hereby detached and excluded from the district". Therefore, regardless of the fact that some of the original district's territory which is now in the city water system might on the happening of a contingency be responsible for past bond obligations, the fact remains that the 1967 Act contemplates qualification of a political subdivision depending upon the valuation of taxable tangible property within the district; and the district at all times since enactment of Section 67.200 has had the geographical boundaries which existed subsequent to the 1961 de-annexation.

CONCLUSION

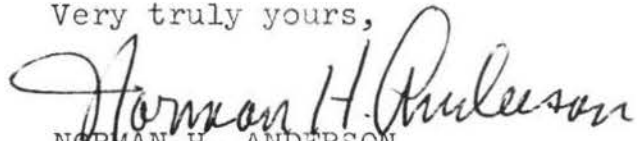
It is therefore the opinion of this office that a public water supply district organized under Chapter 247, RSMo 1959, is eligible to utilize the employee pension plan provisions of Section 67.200, RSMo Cum. Supp. 1967, only if the district's

Honorable Donald L. Manford

assessed valuation of taxable tangible property in the district is \$40,000,000 or more.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enc.--Op. No. 109; 4/25/67; Ferry

REAL ESTATE COMMISSION: Banking institutions and savings and loan
LICENSES: associations which charge fees for making
loans or charge discount points for making
loans from their own funds are not required to obtain a real estate
license under the Missouri Real Estate License Law.

OPINION NO. 280

June 18, 1968



Mr. James Flanagan, Chairman
Missouri Real Estate Commission
1710 Commerce Tower
Kansas City, Missouri

Dear Mr. Flanagan:

This is in reply to your opinion request of May 7, 1968, asking whether savings and loan associations and banking institutions which charge fees for making loans or charge discount points should be licensed under the Missouri Real Estate License Law.

Section 339.010, RSMo Supp. 1967, is the applicable section relating to licensing of individuals and institutions engaging in the real estate business and is set out below in pertinent part:

" * * * nor shall this chapter apply to
* * * any bank, trust company, building
and loan association, insurance company
or farm loan association * * * when en-
gaged in the transaction of business on
its own behalf and not for others. * * * "

As set out above, this section clearly deals with the matter of banking institutions and is intended to apply to savings and loan associations since Section 369.020(1), RSMo 1959, defines them as associations, previously using the name "Building and Loan Associations," and states that same are excluded from the operation of Chapter 339 when business is being transacted on their own behalf. The question then becomes whether making loans and charging fees therefor constitutes business on the organization's own behalf or is a transaction on behalf of others.

Mr. James Flanagan

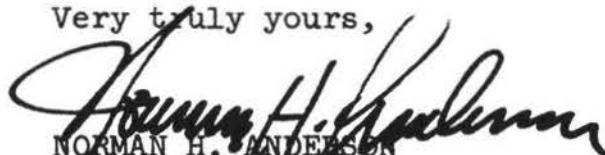
In answering this question, it is necessary to consider the nature of the relationship which exists between depositors and a banking institution or savings and loan institution. It is well settled that the aforementioned relationship in regard to banks is that a debtor and creditor since money when deposited in a bank becomes the property of said bank, the bank then becoming a debtor of the depositor. In regard to savings and loan associations, a depositor actually purchases an interest in the association, the funds becoming the property of the association itself. This being the case, it is the opinion of this office that the making of loans out of such aforementioned funds clearly is the transaction of business on those organizations' own behalf and not on behalf of others.

CONCLUSION

Therefore, it is the opinion of this office that banking institutions and savings and loan associations which charge fees for making loans or charge discount points for making loans from their own funds are not required to obtain a real estate license under the Missouri Real Estate License Law.

The foregoing opinion, which I hereby approve, was prepared by my assistant, L. Michael Lorch.

Very truly yours,

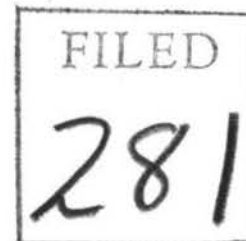


NORMAN H. ANDERSON
Attorney General

May 28, 1968

OPINION NO. 281
Answered by Letter-Lorch

Mr. James Flanagan, Chairman
Missouri Real Estate Commission
1710 Commerce Tower
Kansas City, Missouri



Dear Mr. Flanagan:

This is in reply to your opinion request of May 7, 1968, asking whether auctioneers should be licensed under the Missouri Real Estate License Law.

Section 339.010, RSMo Supp. 1967, is the section relating to those individuals required to be licensed and is set out below in pertinent part:

" * * * nor shall this chapter apply to
a * * * auctioneer employed by the owner
of the property * * * "

As set out above, this section clearly contemplates the sale of real property by an auctioneer and states that Chapter 339 does not apply to auctioneers employed by the owner to sell the property at auction.

For this reason, it is the opinion of this office that auctioneers do not need to obtain a real estate license to sell real property at auction when employed by the owner of the real property. However, it should be noted, that any sale of real property for others in a manner other than at auction or engaging in any other activity which constitutes real estate brokerage as defined by Section 339.010, RSMo

Mr. James Flanagan

Supp. 1967, requires licensing under Chapter 339. In other words, the mere fact that an individual is an auctioneer does not entitle him to act as a real estate broker or salesman except as contemplated by Section 339.010, supra, that being the sale of real property at auction.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

LML:lvh:db

VOTING:

EMPLOYEES:

A Missouri employer is not obligated to allow time off for voting purposes to employees who live and vote in Kansas.

OPINION NO. 283

June 20, 1968



Honorable Charles S. Broomfield
State Representative - 87th District
Missouri House of Representatives
4801 North Lister
Kansas City, Missouri 64119

Dear Representative Broomfield:

This is in response to your request for an opinion concerning a Missouri employer's obligation to allow time off for voting purposes to employees who reside and vote in Kansas.

The applicable Missouri Statute is Section 129.060, RSMo 1959 which provides in part as follows:

"1. Any person entitled to vote at any election held within this state, or any primary election held in preparation for such election, shall, on the day of such election be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of three hours between the time of opening and the time of closing the polls for the purpose of voting;. . ." (emphasis added)

This particular section is not an embodiment of any federal constitutional or statutory right, but is an exercise of the police power by the Missouri legislature in an attempt to safeguard the right of suffrage by taking from employers the incentive and power to use their leverage over employees to influence the vote. Day-Brite Lighting v. Missouri (1952) 342 US 421, 96 L.Ed. 469, 72 S. Ct. 405.

The underscored portions of previously quoted Section 129.-060 clearly indicate that it is limited in application to Missouri elections and residents of Missouri entitled to vote in such elections.

Honorable Charles S. Broomfield


It is a general rule of statutory construction that where a statute enumerates the subjects or things on which it is to operate, or the persons affected, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned. 82 C.J.S. Statutes, section 333, p. 666, Brown v. Morris, 290 S.W.2d 160.

CONCLUSION

Therefore, it is the opinion of this office that a Missouri employer is not obligated to allow time off for voting purposes to employees who live and vote in Kansas.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard E. Dorr.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Opinion No. 284 (1968)
Answered by Letter (Klaffenbach)

November 13, 1968



Honorable Hal E. Hunter, Jr. ✓
Prosecuting Attorney
New Madrid County Courthouse
New Madrid, Missouri 63869

Dear Mr. Hunter:

This is in response to your opinion request regarding the definition of "employee" as used in Sections 70.600 through 70.760, RSMo Supp. 1967, relating to retirement or pensioning of officers and employees of political subdivisions.

It is our understanding that New Madrid County has elected to become an "employer" and to cover its employees under the system. The present question and possible controversy arises from difficulties in determining who are employees of the political subdivision and whether, in certain instances, fees may be considered as part of "compensation" under the "system."

Section 70.630, Paragraph 2, states that,

"In any case of question as to the system membership status of any person, the board shall decide the question."

In addition, Section 70.605, RSMo Supp. states in part as follows:

"16. The board of trustees shall, after reasonable notice to all interested parties, hear and decide questions arising from the administration of sections 70.600 to 70.760; except, that within thirty days after a

Honorable Hal E. Hunter, Jr.

decision or order, any member, retirant, beneficiary or political subdivision adversely affected by that determination or order may take an appeal under the provisions of chapter 536, RSMo.

"21. Subject to the limitations of sections 70.600 to 70.760, the board shall formulate and adopt rules and regulations for the government of its own proceedings and for the administration of the retirement system."

We are advised by the attorney for the board of trustees for the Missouri local government employees retirement system (known as LAGERS), that the trustees of the system have adopted rules governing hearings and proceedings. Reading Paragraph 2, of Section 70.630, in conjunction with Paragraphs 16 and 21 of Section 70.605, it is apparent that it is incumbent upon the board of trustees of the system to decide the questions posed in your opinion request.

In the premises, therefore, we feel that it would be inappropriate for this office to render a decision at this time and under these circumstances, regarding membership and related questions of the system.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

MISSOURI NATIONAL GUARD:
LABOR ORGANIZATIONS:
PUBLIC EMPLOYEES:
COLLECTIVE BARGAINING:

Civilian employees of the Missouri National Guard may join labor organizations under the provisions of Section 105.510, but the organization may not enter into a collective bargaining contract binding on the state.

OPINION NO. 285

December 10, 1968

Major General L. B. Adams, Jr.
Adjutant General of Missouri
Broadway State Office Building
Jefferson City, Missouri



Dear General Adams:

This is in reply to your request for an opinion concerning whether or not the "Association of Civilian Technicians, Inc." is a labor organization and whether or not civilian employees of the Missouri National Guard may join labor organizations under the provisions of Section 105.510, RSMo Cum. Supp. 1967.

The above cited section reads as follows:

"Employees, except police, deputy sheriffs, Missouri state highway patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization."

This section gives public employees generally the right to form and join organizations although it has been held that under the Missouri Constitution, Article I, Section 29, public employees may nevertheless not enter into a collective bargaining contract which will be binding on the State of Missouri. City of Springfield vs. Clouse, (1947), 206 S.W. 2d 539, 545. This statute excludes certain types of officials such as police, sheriffs, highway patrolmen and "Missouri national guard", which latter term in our judgment reasonably means only Missouri National Guardsmen. Therefore, civilian employees are authorized under such section to form and join labor organizations and to present proposals to a public body relative to salaries and other conditions of employment through the representative of their own choosing.

Major General L. B. Adams, Jr.

We enclose copies of Opinion No. 68, Garrett, 5/6/66 and Opinion No. 373, Thompson, 10/17/67 which explain the procedures which public employees who are members of unions must follow in dealing with their public employer.

It thus appears that a civilian employee of your organization whether paid exclusively from state funds or partly from federal funds could, as far as the State of Missouri is concerned, join a labor organization under the terms of Chapter 105, supra, although such organization could not enter into a collective bargaining contract binding on the state but must follow the procedures outlined in the enclosed opinions.

We recognize that many of your employees occupy a dual status, i.e., they work as civilians and also hold National Guard status. These individuals may form unions where such participation is limited to their civilian jobs and functions. However, the union may not represent such individuals in their National Guard capacity dealing with wages, hour and conditions of employment while serving on duty with the Missouri National Guard.

CONCLUSION

It is the opinion of this office that civilian employees of the Missouri National Guard may join labor organizations under the provisions of Section 105.510, RSMo Cum. Supp. 1967, but may not enter into a collective bargaining contract binding on the state.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William L. Culver.

Very truly yours,



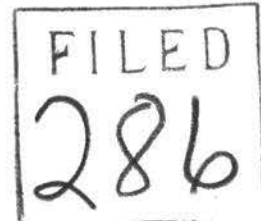
NORMAN H. ANDERSON
Attorney General

Enc.: Op. No. 68; Garrett; 5/6/66
Op. No. 373; Thompson; 10/17/67

INSURANCE:
INSURANCE AGENCY LICENSE:

An insurance agency originally licensed after January 1, 1968 is required to pay an annual license fee of \$25 on or before July 1, 1968.

June 18, 1968



OPINION NO. 286

Honorable James P. Dalton
General Counsel
Division of Insurance
Department of Business and Administration
Jefferson Building
Jefferson City, Missouri

Dear Mr. Dalton:

This is in answer to your request of May 14, 1968, reading as follows:

"A question has arisen in this office as to whether or not an insurance agency licensed under Section 375.061, RSMo Cum. Supp. 1967, is required to pay a license fee of \$25 on or before July 1, 1968 when the agency was originally licensed after January 1, 1968, and at the time of licensing paid a \$25 fee."

The statutory provision in question, Section 375.061, paragraph 4, reads as follows:

"Upon receipt of an application and a fee of twenty-five dollars, the superintendent, if satisfied that the agency has complied with the provisions herein provided, shall issue a license which shall continue until suspended or revoked or the agency is terminated by operation of law; provided that an annual license fee of twenty-five dollars is paid on or before July first of each year."

Section 1.090, RSMo 1959, relating to the construction of statutes, provides that "Words and Phrases shall be taken in their

Honorable James Dalton


plain and ordinary and usual sense. . ." We think that the plain and ordinary meaning of paragraph 4 of Section 375.061 is that the fee paid at the time of the original application and licensing of an agency is separate and distinct from the annual license fee due July 1 of each year. The first \$25 fee accompanies the application which must be processed and approved by the superintendent of insurance. The second \$25 fee is the annual fee which must be paid on or before July 1 by each and every insurance agency in order to maintain its license regardless of when it first received that license.

CONCLUSION

It is the opinion of this office that an insurance agency originally licensed after January 1, 1968 is required to pay an annual license fee of \$25 on or before July 1, 1968 under the provisions of Section 375.061, paragraph 4, RSMo Cum. Supp. 1967.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

ELECTIONS:
BALLOTS:
NONPARTISAN CANDIDATES:
PRIMARY ELECTIONS:

It is not necessary for county clerks or boards of election commissioners to print a separate ballot when there is only one candidate filed on a nonpartisan or independent ticket in a primary election.

OPINION NO. 287

May 27, 1968

Honorable James C. Kirkpatrick
Secretary of State of Missouri
Capitol Building
Jefferson City, Missouri



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion as to whether or not it is necessary for county clerks and/or boards of election commissioners to print a separate ballot when there is only one candidate filed on a nonpartisan or independent ticket in a primary election.

The necessity of printing a ballot in primary elections is regulated by Section 120.430, RSMo 1959, which provides:

"Whenever any person shall have filed as a candidate for nomination upon a party ticket which at the last preceding election for governor shall have cast less than five per cent of the total vote cast for governor in such election, and when not more than one person shall have filed as a candidate for any office on such party ticket, no ballot shall be printed for the primary election as herein provided unless upon petition of at least ten per cent of the voters voting in the county at said preceding election for governor. When no ballots are printed as herein provided, the candidates filing declarations and who are unopposed shall be certified, as by sections 120.300 to 120.650 provided, as the nominees of such party casting less than five per cent of the vote of the state."

Honorable James C. Kirkpatrick

The case of State v. Toberman, (Mo. 1954), 269 S.W. 2d 753, which held that either the state primary or new petition method was available to persons desiring to become independent or non-partisan candidates, also considered the question as to the necessity of printing a nonpartisan ballot wherein the court stated at page 756:


"Both parties agree that, if relator is entitled to file in the primary, Section 120.430 makes it unnecessary to print a nonpartisan primary ballot, if there are no contests on the nonpartisan ticket for any office. We agree that this is within the intent and purpose of the statute, which was intended to prevent unnecessary expense of printing primary ballots for unopposed candidates on tickets which had not received five percent of the total vote cast for Governor in the last preceding election."

CONCLUSION

Therefore, it is the opinion of this office that it is not necessary for county clerks or boards of election commissioners to print a separate ballot when there is only one candidate filed on a nonpartisan or independent ticket in a primary election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard E. Dorr.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

OPINION NO. 288
Answered by Letter--CULVER

December 10, 1968



Honorable R. Jack Garrett
Prosecuting Attorney
Howell County
West Plains, Missouri 65775

Dear Mr. Garrett:

This is in reply to your request for an opinion as to whether the last published financial statement of the City of West Plains, a third-class city with a population of 5836, complies with the requirements of Section 78.180, RSMo 1959. In our opinion your city need not also comply with Section 77.110, RSMo 1959, since you advise that the City of West Plains operates as a commissioned form of government under the optional form for a third-class city as contained in Chapter 78.

Section 78.180 requiring periodical printing and publication of "a detailed, itemized statement of all receipts and expenses of the city" is similar to Section 79.160, RSMo 1959, requiring the financial statements of fourth-class cities to be "full and detailed".

Although the courts have not specifically defined this terminology, we enclose for your guidance a previous opinion of this office, No. 113 rendered March 19, 1962, to the Honorable W. D. Hibler, Jr. That opinion refers to a circuit court decision regarding the City of Hamilton and the publication of their financial statement. We enclose a copy of the court's memorandum decision, and the financial statement which was the subject of the suit as well as the one later published pursuant to the court's decision.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

WLC/jlf
Enc: Op. No. 113, 3/19/62, Hibler
Two Financial Statements
Court's Memorandum Decision

AMBULANCES:
COUNTY HOSPITALS:
HOSPITALS:
SPECIAL TAX LEVIES:

112
A county hospital organized under the provisions of Section 205.160, RSMo et seq., may establish and maintain an ambulance service supported in whole or in part by special tax levy funds pursuant to Section

205.200, RSMo Supp. 1967. Such ambulance service may not be a general service but must be in direct connection with the services rendered county hospital patients.

OPINION NO. 290

December 5, 1968



Honorable Dennis C. Brewer
Prosecuting Attorney
Perry County Courthouse
Perryville, Missouri 63775

Dear Mr. Brewer:

This is in response to your question concerning whether or not the Perry County Memorial Hospital has the authority to use the funds derived from their special tax levy which were obtained under Section 205.200, RSMo Supp. 1967, for the operation of an ambulance service which will serve the direct needs of the county hospital.

Section 205.200, RSMo Supp. 1967 states:

"1. Except in counties operating under the charter form of government, the county court in any county wherein a public hospital shall have been established as provided in sections 205.160 to 205.340, shall levy annually a rate of taxation on all property subject to its taxing powers in excess of the rates levied for other county purposes to defray the amount required for the maintenance and improvement of such public hospital and for constructing and furnishing necessary additions thereto, as certified to it by the board of trustees of the hospital; the tax levied for such purpose shall not be in excess of twenty cents on the one hundred dollars assessed valuation. The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other."

"2. Any funds of the hospital, whether derived from the tax authorized by this section or from the operation of the hospital, and whether

Honorable Dennis C. Brewer -

collected before or after October 13, 1965, may be used for constructing and furnishing necessary additions to the hospital."

We note that the above section contains the usual limitation in that the funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied, and none other. The purpose for which the tax may be levied, however, again as stated in the section, is to defray the amount required for maintenance and improvement of such hospital and for constructing and furnishing additions thereto.

We note also that Section 205.270, RSMo, states as follows:

"Every hospital established under sections 205.160 to 205.340 shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, such hospital always being subject to such reasonable rules and regulations as said board may adopt in order to render the use of said hospital of the greatest benefit to the greatest number; and said board may exclude from the use of such hospital any and all inhabitants and persons who shall willfully violate such rules and regulations. And said board may extend the privileges and use of such hospital to persons residing outside of such county, upon such terms and conditions as said board may from time to time by its rules and regulations prescribe."

We think it is clear from the context of the last quoted section that services of the county hospital are to be extended as broadly as possible to any person requiring care. In this respect, therefore, it is our opinion that the furnishing of ambulance service for the patients of said hospital is a part of the operation of the county hospital and that the funds from the special tax levy may be used for this service. It is also our opinion that the Board of Directors of said hospital may make rules and regulations establishing rates for such services under the provisions of Section 205.270.

The ambulance service provided may not be a general one, however, and must be in direct connection with the services rendered patients of the hospital.

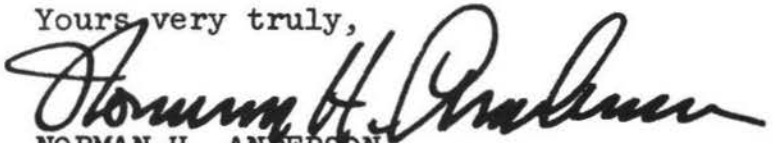
Honorable Dennis C. Brewer -

CONCLUSION

It is the opinion of this office that a county hospital organized under the provisions of Section 205.160, RSMo et seq., may establish and maintain an ambulance service, supported in whole or in part by special tax levy funds pursuant to Section 205.200, RSMo Supp. 1967. Such ambulance service may not be a general service but must be in direct connection with the services rendered county hospital patients.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

COURTS:
MAGISTRATES:
EXECUTIONS:
FEES:

Under Section 483.610, RSMo 1959, magistrate court clerks should charge thirty-five cents for issuing all executions in civil cases.

OPINION NO. 291

November 26, 1968

Honorable Robert H. Branom
State Representative--35th District
Missouri House of Representatives
2151 69th Street
Hillsdale, Missouri 63121



Dear Representative Branom:

This is in reply to your request for our official opinion concerning what is meant by the term "each renewal" of execution in civil cases in the magistrate courts regarding the fees charged therefor, under the provisions of Section 483.610, RSMo 1959, the applicable portion of which reads as follows:

"1. There shall be charged and collected by the clerks of the magistrate courts fees for certain of their services as follows:

For issuing each execution in civil cases-----	\$0.35
For each renewal of execution in civil cases-----	.25
For making certified copies on appeals or certiorari, in civil cases, for each one hundred words-----	.10
For copies of records, pleadings or instruments on file in the office of such clerks, for every one hundred words and figures-----	.10"

Section 517.910, RSMo 1959, regarding magistrate court procedure provides:

"Execution, except as otherwise herein provided, shall have the same force and effect and be proceeded upon the same as executions issued out of other courts of record; provided, the return date of executions issued by courts of record

Honorable Robert H. Branom

not having terms shall be stated in the writ of execution but no such execution shall be returnable in less than thirty days, nor more than ninety days from date of issuance."

Where a statute uses the term "execution" without further definition, it has been held that no distinction is intended between types of execution but that the general definition should apply. Smith vs. Rogers, et al., (Mo. Sup. 1905), 90 S.W. 1150, 1152, stating (citing authority): "A writ of execution is the process by which a court carries out its judgment." See also Weniger vs. Weniger, (MA 1930), 32 S.W. 2d 775, 776. In 33 C.J.S., Executions, Section 1, we find execution defined as " * * * a judicial writ issuing from the court where the judgment is rendered, directed to an officer thereof, and running against the body or goods of a party, by which the judgment of the court is enforced"; and (Section 5 (b)): " * * * a money judgment being an entirety, separate executions cannot issue on each of the counts of the complaint, although there were findings and a judgment on each count separately; but where a judgment decrees a distinct and separate amount in favor of particular plaintiffs, a separate execution may issue in favor of each." The form of general executions in Missouri is prescribed in Section 513.025, RSMo 1959.

A "renewal execution" is defined thusly in 33 C.J.S., Executions, Section 85 (f):

"A renewed execution is not a different one from the original but derives its efficacy, not from the mere change of its date, but from the original signature of the clerk.

* * * * *

Under some statutes the reissuance of an execution with a renewal thereof indorsed thereon is authorized. There must be a substantial compliance with the terms of these statutes. . . Authority to renew an execution does not make it permissible to issue a different kind of execution."

A statute providing procedure in the justice courts for an unsatisfied execution to be "renewed" from time to time by the justice's indorsement on the original document was on the books from at least 1835 (R.S. 1835, p. 366, Section 8) until its repeal

Honorable Robert H. Branom

in 1945 following adoption of the new Constitution (R.S. 1939, Section 2706; repealed L. 1945, p. 1078). The antecedent of our present fee schedule statute, Section 483.610, containing court charges for "renewal" of executions first appears in R.S. 1879, Section 5622, providing as now thirty-five cents for execution and twenty-five cents for "renewal" of execution. The old substantive renewal by endorsement statute was discussed, along with justice court executions in general (then Section 4038, R.S. 1899), by the St. Louis Court of Appeals in Commercial Real Estate and Brokerage Co. vs. Reimann, (Mo. App. 1906), 93 S.W. 305, 306:

"Appellants say a justice of the peace has no power to issue an alias execution, and that his authority in the matter of executions is confined to issuing one and renewing it from time to time. In support of this position, we are cited to that section of the statute which provides that if an execution is not satisfied, it may be renewed by the justice at the request of the plaintiff by an indorsement to that effect signed by him, which indorsement shall renew the execution for 90 days from the date it is made. Rev. St. 1899, §4038. This point looks to us to be more captious than substantial. The second execution, issued by the justice, was tantamount to the renewal of the first one, which had not yet expired. The second one ran for precisely the same time that the first one would, had it been renewed. It has been decided once by this court, and taken for granted in other cases, that a justice has power to issue an alias execution. State, to Use, v. Boettger, 39 Mo. App. 684; State ex rel. v. Rainey, 99 Mo. App. 218, 73 S.W. 250; State ex rel. v. Stokes, 99 Mo. App. 236, 73 S.W. 254. A justice's judgment will support an execution for 3 years, and may be renewed from time to time for 10. An execution cannot be renewed after it has expired. State, to Use, v. Boettger, supra. Now it is unreasonable to say that if, from inadvertence or a belief that no goods can be found to levy on, an execution is allowed to lapse, the plaintiff never can have an alias, even though he discovers plenty of property subject to

Honorable Robert H. Branom

levy. Freeman says a plaintiff's right to have an alias execution as long as his judgment remains alive and unpaid, is given by the common law and no statutory authority for an alias need be shown; that the right exists unless expressly taken away by statute. Freeman, Executions (3d Ed.) §48. We decline to hold that the alias execution was void, and the summons to the garnishees, by virtue of it, failed to confer jurisdiction of them on the court."

State v. Boettger, supra in above quote, also held that under justice of the peace practice, an execution could be renewed but not after the old one had expired. With no statutory "renewal" now in effect, all executions issued are now new executions.


It therefore appears that since 1945 there has existed no authority in Missouri for a "renewal" of execution and the consequent twenty-five cent fee for such service in the magistrate courts, and that the twenty-five cent charge for "renewal" of executions contained in Section 483.610, RSMo 1959, is thus inoperative.

CONCLUSION

It is the opinion of this office that under Section 483.610, RSMo 1959, magistrate court clerks should charge thirty-five cents for issuing all executions in civil cases.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,


NORMAN H. ANDERSON
Attorney General



November 26, 1968

Mr. W.E. Sears
Director
Board of Training Schools
Box 447
Jefferson City, Missouri 65102

Dear Mr. Sears:

This is in response to your request for an opinion
stated as follows:

"In accordance with Sections 105.500
through 105.530 Cumulative Supplement 1967,
pages 317 and 318, may teachers employed by
the State Board of Training Schools present
bargaining proposals to the Board of Training
Schools through a labor organization or the
exclusive bargaining representative?

"In addition, are such employed teachers
of the Board of Training Schools to be counted
in determining a majority of employees for an
appropriate unit for purposes of collective
bargaining?"

In the statute establishing the State Board of Training
Schools, it is declared that such " . . . schools are hereby
classified as educational institutions . . ." (Section 219.020
RSMo 1959). Furthermore, " . . . the state department of edu-
cation [is] to set standards of education and school attendance
in the training schools . . ." (Section 219.320 RSMo 1959).

We think it clear beyond question that individuals employed
in the State Training Schools for the purpose of conducting aca-
demic classes are teachers within the meaning of Section 105.510
RSMo 1967 Cum. Supp. which states:

"Employees, . . . of any public body shall
have the right to form and join labor organ-
izations and to present proposals to any public

body relative to salaries and other conditions of employment through the representative of their own choosing . . ."

The quoted statute, conferring upon public employees the right to present proposals to public bodies relating to salaries and other conditions of employment, contains a specific exemption applying, inter alia, to " . . . all teachers of all Missouri schools, colleges and universities . . ."

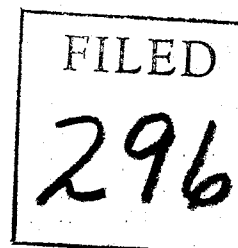
Consequently teachers employed in the State Training Schools are not empowered to present proposals to the Board of Training Schools through a labor organization under the provisions of Sections 105.500 to 105.530 RSMo Supp., 1967. That being the case, they may not be counted in determining if a majority of those employed at a State Training School desire to form a unit for the purpose of presenting proposals to the governing body through a representative of their own choosing under provisions of Sections 105.500 to 105.530 RSMo Supp., 1967.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

JUN 19 1968

OPINION NO. 296
Answered by Letter
(Wood)



Honorable W. F. Bollinger
Acting Director
Department of Community Affairs
State of Missouri
Jefferson Building
Jefferson City, Missouri 65101

Dear Mr. Bollinger:

This is in reply to your recent request for an official opinion on the authority of the ABCD Regional Planning Commission to enter into a Bi-State Planning Agreement with Doniphan County, Kansas.

The legislature has provided for interstate contracts and cooperation on the part of Missouri regional planning commissions.

Section 251.380, RSMo Cum. Supp. 1967:

"In matters relating to comprehensive planning, a regional planning commission created under sections 251.150 to 251.440, and any planning commission or other organization, public or private, heretofore constituted or designated as referred to in section 251.160-4 of this act, may enter into a contract and cooperate with any federal, state or local unit including other planning commissions, or organizations, within this or other states under the laws of Missouri."

Honorable W. T. Bollinger

Furthermore, the legislature has directed the Department of Community Affairs to "* * *Encourage and assist local governments to develop solutions of their common problems, through joint service agreements, interstate compacts, and other appropriate means, * * *" §251.030(5), RSMo 1967, Cum. Supp. (emphasis added).

Therefore, it is our opinion that a regional planning commission formed pursuant to Chapter 251, RSMo has the authority to enter into a Bi-State Planning Agreement with planning commissions of other states.

Yours very truly,

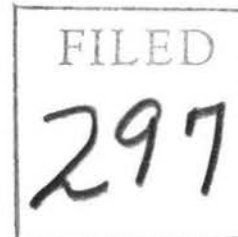
NORMAN H. ANDERSON
Attorney General

LRW:fb

JUN 19 1968

OPINION NO. 297
Answered by Letter
(Peterson)

Honorable J. Anthony Dill
Representative--44th District
8011 Grandvista Avenue
Affton, Missouri 63123



Dear Representative Dill:

In your recent opinion request you, in part, stated:

"Art. 9 Sec. 3 (b) of the Constitution of 1945 requires that twenty-five percent of the 'state revenue', exclusive of interest and sinking fund be applied annually to the support of free public schools.

Art. 4 Sec. 30 (b) of the Constitution of 1945 appropriates without legislative action all 'state revenue' derived from highway users to highway purposes.

I respectfully request your opinion as to whether the term 'state revenue' as used in Art. 9 Sec. 3 (b) includes that state revenue derived from highway users to which Art. 4 Sec. 30 (b) applies."

Honorable J. Anthony Dill

The meaning of the word "state revenue" as it is employed in Article IX, Section 3 (b)*, has been well settled since 1915. That year, the Missouri Supreme Court construed the word "state revenue" found in Article XI, Section 7, Missouri Constitution, 1875, predecessor of the present Article IX, Section 3 (b), in State ex rel. Gass v. Gordon, Mo. Supp., 181 S.W. 1016.

The court in the Gass case, *supra*, defined "state revenue" as being "... the annual and current income of the state, however derived, which is subject to appropriation for general public use". (l.c. 1020). The court then continued to state:

"This excludes such income as the constitution . . . may specifically devote to a special purpose . . . or which is not required to be paid into the state revenue fund, but into a special fund, e.g... the money derived from license fees on motor vehicles . . ." (l.c. 1020)

Article IV, Section 30 (b), specifically directs that all state revenue derived from highway users as an incident to the use or right to use the highways of the state, less certain specified costs and certain refunds, shall be credited to a special fund and stand appropriated without legislative action for certain purposes.

Therefore, it would appear abundantly clear that funds derived from highway users pursuant to the authority of Article IV, Section 30 (b), *supra*, are state revenue but such revenue is to be credited to a special fund and therefore would not become subject to appropriations for public schools or any other general public use.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

WAP:jlf:fb

*All references herein to the Constitution are to the Missouri Constitution of 1945, as amended, unless otherwise noted.

November 15, 1968



OPINION NO. 298
 Answered by Letter
 (Stevens)

Honorable Les Langsford
 State Representative
 Missouri House of Representatives
 141st District
 2311 South Dollison
 Springfield, Missouri 65804

Dear Representative Langsford:

Your opinion request, dated May 22, 1968, is as follows:

"During the regular session of the Seventy-fourth General Assembly, we added in Section 287.020 the following: including executive officers of corporations.

"My understanding of this provision was to remove the question as to whether or not executive officers of corporations were covered under Missouri Workmen's Compensation Law. There seems to be a question now whether executive officers of corporations are covered due to the definition of the word employee because some officers have no master other than the corporation."

Honorable Les Langsford

Section 287.020, RSMo Supp., 1967 provides in part as follows:

"The word 'employee' as used in this chapter shall be construed to mean every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations. * * * *" (emphasis ours)

It is true that formerly some of the cases in this State held that a corporate official was not under the control and direction of others, and consequently was not subject to the Workmen's Compensation Act.

It is apparent that it was the obvious intent of the legislature to make all officers of a corporation "employees", regardless of their status within the corporation.

We do not see how any other conclusion can be reached and it is our view that all "executive officers" of a corporation are covered under the Missouri Workmen's Compensation Act as amended.

Yours very truly,

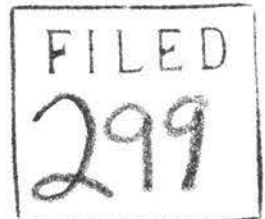
NORMAN H. ANDERSON
Attorney General

OHS:fb

ms

December 18, 1968

OPINION NO. 299
Answered by Letter
Klaffenbach



Honorable Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Wheeler:

This is in response to your question concerning the legal status of the Coates property. Your letter states the facts as follows:

"On May 12, 1964, Gordon R. Coates and his wife, Thelma B. Coates, executed a Quit Claim Deed transferring title of a farm in St. Charles County to the State Department of Education of the State of Missouri, for the use and benefit of the Missouri School for the Blind at St. Louis. On January 29, 1966, an additional 16.395 acres adjacent to the farm was purchased from Fred and Bertha Struckhoff, with title made in favor of the State Board of Education, for use and benefit of the Missouri School for the Blind at St. Louis and paid for by Mr. and Mrs. Coates."

In this response we will consider only the questions relating to the Coates farm.

Your letter further indicates that:

"Since problems arose as a result of stipulations on additional monies to be donated by Mr. Coates to use for building and after consideration by the State Board of Education of the distance from the St. Louis

Honorable Hubert Wheeler, Commissioner

campus, the feasibility of such operation and the limited and costly usage of the property, the Board did not feel it advisable to use the property for a second campus."

And that:

"On May 27, 1968, Mr. Gordon Coates requested the State Board of Education to pass a resolution that would show the land was to be returned to Mr. and Mrs. Gordon Coates."

Further communication with your office reveals that there is no record in any of the Board's meetings indicating that the Board ever formally accepted or rejected the gift of the Coates' farm. Likewise, there is no evidence that an acceptance or rejection was ever executed by the State Board of Education. The statute applicable at the time of the execution of the deed was Section 177.025, RSMo 1959. This section was reenacted without any substantial change and is presently Section 178.060, RSMo Supp. 1967. This latter section states in full as follows:

"The state board of education may receive and administer any grants, gifts, devises, bequests or donations by any individual or corporation to the Missouri School for the Blind at St. Louis and the Missouri School for the Deaf at Fulton. Grants, gifts, devises, bequests or donations made for a specified use shall not be applied either wholly or in part to any other use."

With respect to official actions of the Board, we note that Section 160.080, RSMo 1959, which was applicable at the time of the Coates' deed, stated:

"At all meetings of the board five members shall be necessary to constitute a quorum for the transaction of business, but no official actions may be taken unless a majority of the whole board may vote therefor."

Further, Section 160.090, RSMo 1959, which was also applicable at the time of the execution of the deed, stated in part:

"3. . . . No member of the board shall have any authority as an individual by reason of his official position, but said

Honorable Hubert Wheeler, Commissioner

board may act only when lawfully convened in a regular or special meeting, and it may speak only through its official records."

The provisions cited above were repealed and reenacted without change in substance in Section 161.082, RSMo Supp. 1967, effective July 1, 1965.

It is clear that the law provides that no official actions may be taken by the Board unless a majority of the whole Board votes therefor. It is also clear that action taken by an administrative officer of the State Department of Education without authorization of the State Board of Education is void and not binding on the Board.

Returning to Section 178.060, RSMo Supp. 1967, we wish to point out that the State Board of Education may receive and administer any such gifts. The State Board is not required to take or receive or administer any such gifts and in order for the Board to officially take any action, they must do so in accordance with the provisions requiring a quorum for the transaction of business and a vote of the majority of the whole Board.

In view of the facts submitted to us, it is our opinion that the Board of Education never accepted the Coates' property.

The wisdom of the Legislature in requiring official action is demonstrated by the confusion which has resulted from an informal approach to the purported acceptance of the property and the resultant difficulties concerning a meeting of the minds with the grantors respecting the use of the property.

We conclude that since the Board of Education failed to accept the property, it is now free to either accept or reject. That is, the State Board may formally convene at a regular or special meeting in accordance with the provisions of the statute and at that time may either formally accept or may formally reject the grant of the property. If the Board of Education rejects the grant of the property the rejection should be clearly shown in its minutes and a rejection in writing should be duly authorized and executed. In addition, since the Coates' Quit Claim Deed was recorded in the Recorder's office in St. Charles County, the Board should authorize the execution of a Quit Claim Deed to the Coates with respect to the property and the documents evidencing the Board's official rejection of the property as well as the Quit Claim Deed should be recorded with the Recorder of Deeds in said county.

Yours very truly,

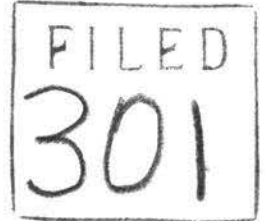
NORMAN H. ANDERSON
ATTORNEY GENERAL

COUNTY ASSESSOR:
COUNTY COLLECTOR:
TAX ASSESSMENT:
TAX COLLECTION:

When more than one person claims ownership of a tract of land and insists on paying the taxes due on the particular tract of land; 1. The assessor should record the names of all claimants in the ownership column of the tax books, and,

2. The collector should receive and issue receipts for all amounts tendered by claimants as payment of the amount due on the particular tract of land.

OPINION NO. 301



July 30, 1968

Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri 65201

Dear Mr. Conley:

This is in response to your request for an opinion which was stated as follows:

" a tract of real estate is being claimed by two different people and at the present time the property is on the tax rolls for one of these people and they are paying the taxes on it. The other person claiming title to said real estate wishes to pay the taxes and the assessor and collector are in the position of not wishing to decide who is the rightful owner. It also appears that both alleged owners have some type of warranty deed conveying to them interest in said real estate.

Can the assessor extend the tax books for real estate listing both individuals who claim ownership and can the collector accept taxes from both individuals?"

The duties of the assessor are found in Chapter 137 Revised Statutes of Missouri. Section 137.115 provides that the assessor shall make a list of all real and tangible personal property in his county and assess the same at its true value in money. Section 137.-215 provides that the owner's name if known shall be placed in the land list and real estate book respectively.

Honorable Frank Conley

The county assessor clearly does not have the judicial authority to make a determination as to ownership of land. Although Missouri courts have not ruled on this specific issue, it has been the subject of litigation in other jurisdictions, as stated in Esso Standard Oil Company v. Jordan (La. 1956), 92 So. 2d 377 at 381:

"Further, the law does not demand, as a condition to a valid assessment, that an assessor must search beyond the official records to ascertain who might or might not claim to own or to have an interest in a given parcel of land; nor is an assessor called upon to be the judge as to the holder of a superior title as between conflicting claimants. . . ."

See also Dillard v. Alexander (Ala.), 168 So. 2d 233 and State ex rel. Matson v. Laurendine (Ala.), 74 So. 370.

Since the assessor is not authorized to determine who has superior title between adverse claimants, he is not at liberty to select one of the claimants to be listed as owner of the property in the tax books. If both claimants insist that they should be listed on the tax books, the assessor should place both of their names in the ownership column. The correct name of the owner of real estate is only a matter of convenience, and is not necessary to the validity of the assessment, which is made against the land itself rather than its owner. State v. Gomer (Mo. 1936), 101 S.W. 2d 57, 63. Section 137.170.

In passing upon the collector's duty in the collection of taxes, the Missouri Supreme Court in Mathews v. The City of Kansas, 80 Mo. 231, 236 stated:

". . . . The assessment was made on the land itself by its numbers, regardless of who was its owner. It was not the duty of the collector to look up the owner or apply to him for the taxes. The tax by law became due and payable at certain prescribed periods, and it was the duty of the owner to go to the collector, or send someone, and pay this tax assessed on the land as such. So the collector in his testimony but stated a legal truth in saying that he had no concern as to who was the owner of a given lot or tract of land. He was receiving the tax imposed on the given lot as such." (emphasis added)

Honorable Frank Conley

Since the duty of the collector is merely to collect the amount due with regard to a particular tract of land, it makes no difference from whom he receives the payment so long as the payor intends that the payment be applied to the tax due on the land in question. If more than one claimant insists that he be allowed to pay the taxes on the land, the collector should take their money and give each of them a receipt. This should be done since the collector has no more authority than the assessor to determine superior title between adverse claimants. If the collector were to accept payment tendered by one claimant and not the other, he would be arbitrarily giving one the benefit of a tax receipt as evidence of ownership.

CONCLUSION

Therefore, it is the opinion of this office that when more than one person claims ownership of a tract of land and insists on paying the taxes due on the particular tract of land;

1. The assessor should record the names of all claimants in the ownership column of the tax books, and
2. The collector should receive and issue receipts for all amounts tendered by claimants as payment of the amount due on the particular tract of land.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Dorr.

Yours very truly,



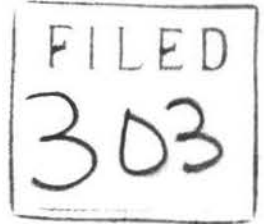
NORMAN H. ANDERSON
Attorney General

ELECTIONS:
BONDS:

The respective counties in this state are liable for and are obligated to pay the expense of bond elections for County Hospitals and County Nursing Homes and there is no authority to pay such expenses from the proceeds of bonds sold pursuant to such elections.

OPINION NO. 303

August 1, 1968



The Honorable Charles A. Weber,
Prosecuting Attorney,
Ste. Genevieve County
Ste. Genevieve, Missouri 63670

Dear Mr. Weber:

We have your request for an official opinion of this office, which is as follows:

"I would like an opinion on the following:
At a special county election for the issuance of bonds for a hospital or nursing home, is the County responsible for the costs of the election if the bond issue is successful?"

You have further advised that:

"... the request in my letter of June 1, 1968, deals with a County Hospital and a County Nursing Home as such and is not concerned with Hospital or Nursing Home districts."

"The elections were held under the provisions of Chapter 205 starting with 205.160 and the bonds issued under Chapter 108."

Section 205.160, RSMo 1959, is as follows:

"Establishment and maintenance of hospitals--
bonds.--The county courts of the several
counties of this state are hereby authorized

The Honorable Charles A. Weber

as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

Section 205.375, RSMo 1959, is as follows:

"Nursing homes, county or township may acquire and erect--issuance of bonds--leasing of homes.--1. For the purposes of this section 'nursing home' means a facility for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services

(1) Which is operated in connection with a hospital, or

(2) In which such nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the state.

2. The county court of any county or the township board of any township may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies, and services necessary to carry out such purposes.

3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions.

4. The county courts or township boards may provide for the leasing and renting of the nursing homes and equipment on the terms and conditions that are necessary and proper to nonprofit organizations for the purpose of operation in the manner provided in subsection 1."

The Honorable Charles A. Weber

You state that the elections were held under the provisions of Chapter 205 and Chapter 108, RSMo. There are no provisions in the above chapters authorizing the payment of election expenses from the proceeds of the bonds which you state were issued pursuant to Chapter 108, RSMo 1959.

Section 108.110, RSMo 1959, is as follows:

"Moneys deposited in county treasury--
county court to withdraw money for
purposes for which bonds were issued.
--The moneys derived from the sale of such bonds shall be deposited in the county treasury, and the county clerk shall charge the treasurer therewith. And the said moneys shall be drawn from the treasury upon the order of the court for the purposes for which the bonds were issued."

Section 108.180, RSMo 1959, is as follows:

"Bond Issue---funds kept separate.--When
any bonds shall have been issued by any
county . . . , as provided under the
constitution and laws of this state for
the incurring of indebtedness, or for
refunding, extending, unifying the whole
or any part of their valid bonded in-
debtedness, the proceeds from the sale
thereof and all moneys derived by tax
levy, . . . , shall be kept separate and
apart from all other funds of such
governmental unit,. . . ; provided, that
in no case shall the proceeds derived from
the sale of any such bonds be used for any
purpose other than that for which such
bonds were issued, nor shall such interest
and sinking fund be used for any purpose
other than to meet the interest and princi-
pal of such bonds; . . . "

Nowhere in the foregoing statutes is any authority given to pay for the cost of the bond election from the proceeds of the bonds voted therein. Chapter 108, RSMo governs bond issue generally. Note, Sections 108.110 and 108.180 supra provide that the money shall be used for the purposes for which the bonds were issued and none other.

Chapter 111, RSMo 1959, entitled "Conduct of Elections" provides that expenses incident to the preparation for and holding of a general election shall be borne by the respective counties in this state.

The Honorable Charles A. Weber

Section 111.300, RSMo 1959, is as follows:

"General election laws to govern special elections on bond issues.--Such special election,....(referring to special elections in counties for issuance of bonds),....."except as provided in section 111.290, shall, as near as possible, be conducted in the same manner and be governed by the same laws, as a general election."

Section 108.060, RSMo provides as follows:

"Form of ballot.--1. The county court of such county shall prepare and cause to be printed ballots to be used at such election which shall be in substantially the following form:

Official Ballot

Instructions to voters:

To cast a ballot in favor of the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'Yes'; to vote against the proposition submitted upon this ballot place a cross (X) mark in the square opposite the word 'No'.

Shall the following be adopted:
Proposition to issue the bonds of.....YES ()
(Insert name).....county of the
amount of \$.....for the purpose
of.....(Insert purpose) NO ()

2. The election provided for in sections 108.010 to 108.110 shall be held and conducted and the returns thereof made, examined and cast up in the same manner and in all respects as in elections for state and county officers, and the county clerk or the board or boards of election commissioners, if there be such a board or boards, shall certify the results thereof to the county court."

It is therefore plain that the county is liable for the expense incurred for in preparing and holding a special bond election for the purposes set out pursuant to the sections quoted supra.

The Honorable Charles A. Weber

As stated herein above, there are numerous other sections of Chapter 111, RSMo 1959, respecting the conduct of general elections which provide that the various items of expense shall be paid by the respective counties of the state holding the election. Section 111.350, RSMo 1959, provides that judges and clerks of the election in returning the poll books and ballots to the county clerk's office shall be paid out of the county treasury.

Section 111.480, RSMo 1959, provides that the county clerk shall cause the sheriff of the county or his deputy to deliver ballots to the judges of the election before the polls are open, such officers to be allowed reasonable compensation therefor, to be provided for by the county court.

Section 111.490, RSMo 1959, requires the sheriffs of their respective counties to provide ballot boxes at the expense of their counties for general elections. These are some of the sections of the election laws imposing the cost of holding general elections upon the counties. There is no statute in this state to the contrary.

CONCLUSION

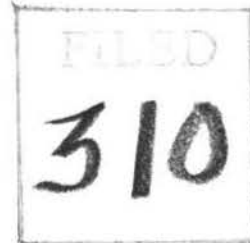
It is, therefore, the opinion of this office that the respective counties in this state are liable for and are obligated to pay the expense of bond elections for county hospitals and county nursing homes and that there is no authority to pay such expenses from the proceeds of bonds sold pursuant to such elections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Arnold Brannock.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

JUN 19 1968



Honorable Donald L. Gann
State Representative District 146
Missouri House of Representatives
Ozark, Missouri 65721

Dear Representative Gann:

This is in answer to your letter of recent date in which you ask for an official opinion of the Attorney General on the question whether a county clerk can at the request of a candidate for office, print on the primary ballot, the name of such candidate different from the name which the candidate signed on his declaration of candidacy.

In the particular case inquired about, you ask whether the clerk at the request of the candidate can print on the primary ballot the name "Dean Adams" in place of the name, "Arthur D. Adams" signed in the declaration.

We are enclosing a copy of an official opinion rendered under date of October 20, 1950 to Mr. Lane Harlan, No. 37 (1950) which we believe answers your question. Such opinion held that the county clerk at the request of a candidate could change the name under which such individual was nominated, that is, he could change the name "C. H. Cochran" under which name he was nominated to "C. Harrison Cochran," which name would be on the ballot at the November general election if such changed name was the name ordinarily used by such candidate and sufficiently identified him.

We believe that the reasoning in the enclosed opinion is applicable to your request and that the county clerk may at the request of the candidate after the final filing date for a primary election change the name the candidate signed in his declaration of candidacy if such changed name is a name ordinarily used by the candidate and sufficiently identifies him.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Encl: No. 37 - October 20, 1950

ELECTIONS:
REGISTRATION RECORDS:
COUNTY CLERK:

The County Clerk of Jasper County is charged with and has the duty to retain possession of the registration records of Jasper County at all times, except to deliver, or cause to be delivered, said registration records to the judges of election appointed under and by virtue of the general election laws of election, on the day before any primary or general election for which registration is made. There is no statutory requirement that such registration records be delivered by the sheriff.

OPINION NO. 311

July 16, 1968

Honorable Robert Ellis Young
State Representative, Dist. 33
208 West Macon Street
Carthage, Missouri 64836



Dear Representative Young:

This opinion is in answer to your request, which is as follows:

"Section 114.140 provides that the County Clerk shall deliver the registration records. Section 116.060 provides that the County Clerk shall deliver, 'or cause to be delivered,' these records.

"Since Section 111.480 provides that the County Clerk shall cause ballots to be delivered to the judges of election, said delivery to be made by the Sheriff, there is a question as to whether the law means the County Clerk can cause the registration records to be delivered by the Sheriff in the same manner.

"It has been the practice for the Sheriff to deliver Joplin and Carthage registration records since the registration law for these cities became effective. Now that the delivery problem is heightened by the adoption of a county-wide registration at the 1966 general election, further clarification is needed."

Honorable Robert Ellis Young

Since county-wide registration outside of cities which had voter registration was adopted by Jasper County at the 1966 general election, Section 114.140, RSMo 1959 applies to such county and provides:

" . . . The county clerk, on the day before any primary or general election for which registration is made, shall deliver to the judges of election, appointed under and by virtue of the general laws of election, proper registration records for their respective precincts and shall take a receipt from the judge to whom the same may be delivered and keep the receipt on file until the records are returned. All affidavits required by this chapter shall be preserved by the county clerk until canceled as a part of the registration records to which they relate."

This section very definitely charges the county clerk with possession of and responsibility for delivery to the judges, the day before a primary or general election, of the registration records, and there is no requirement in such section for delivery by the sheriff of such registration records to the judges, nor is the sheriff mentioned in said section.

You next refer to Section 116.060, RSMo 1959, applicable to cities of over 10,000, and the phrase therein, "or cause to be delivered." The pertinent portion of this section is as follows:

"The county clerk, on the day before any election for which registration is made, shall deliver, or cause to be delivered, to the judges of election, appointed under and by virtue of the general laws of election, proper registration records for their respective precincts and shall take a receipt, or cause the same to be taken, from the judge to whom the same may be delivered and keep same on file until said records are returned."

We believe that this quoted portion of Section 116.060, RSMo 1959 containing the words, "or cause to be delivered," means, as clearly stated, that the clerk shall be responsible for delivery of the registration records. There is no requirement in such section that the sheriff deliver the registration records. The responsibility is placed on the county clerk.

CONCLUSION

It is the opinion of this office that the County Clerk of

Honorable Robert Ellis Young

Jasper County is charged with and has the duty to retain possession of the registration records of Jasper County at all times, except to deliver, or cause to be delivered, said registration records to the judges of election appointed under and by virtue of the general laws of election, on the day before any primary or general election for which registration is made. There is no statutory requirement that such registration records be delivered by the sheriff.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Arnold Brannock.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

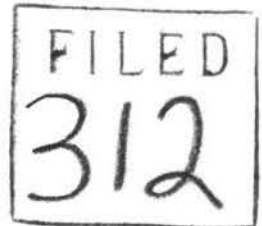
NORMAN H. ANDERSON
Attorney General

LIQUOR CONTROL:
LIQUOR:
BONDS:
LICENSES:

Applicants for licensure to sell intoxicating liquor by the drink at retail for consumption on the premises pursuant to Section 311.090(2), RSMo 1959, and applicants for licensure to permit the drinking or consumption of intoxicating liquor in, on, or about the premises pursuant to Section 311.480(4), RSMo 1959, are required by law to post bond as required by such sections.

OPINION NO. 312

July 30, 1968



Honorable Edward T. Linehan
State Senator, Sixth District
314 North Broadway
St. Louis, Missouri 63102

Dear Senator Linehan:

This is in response to your request for an opinion from our office which request states:

"In the 1967 General Session of the Legislature we passed two bills which attempted to repeal the bond requirements for applicants for the sale of intoxicating liquor and non-intoxicating beverages under Chapter 311 and 312.

"I have spoken to Mr. Downing about this and ask this opinion whether or not the licensees are still required to post bond, which was formerly required. The Supervisor of Liquor, Mr. Wiggins, has interpreted Section 311.080, Section 2, to require such bond.

"This was definitely not the intent of the Legislature, and I would like to know what your opinion is on it."

The Senate Bills referred to in your request passed by the 74th General Assembly were numbered 40 and 41 became effective October 13, 1967.

Senate Bills 40 and 41 repealed and reenacted Sections 311.230 and 312.080, RSMo 1959.

Honorable Edward T. Linehan

Sections 311.230 and 312.080, supra, provided generally, that applications for license to manufacture or sell intoxicating and nonintoxicating liquor be made to the Supervisor of Liquor Control and further, that a bond accompany the application. The result of these new Senate Bills was, that Sections 311.230 and 312.080 now no longer require the applicant for licensure to manufacture or sell intoxicating or nonintoxicating liquor, to furnish a \$2,000 bond. These reenacted sections are found in the 1967 Cumulative Supplement.

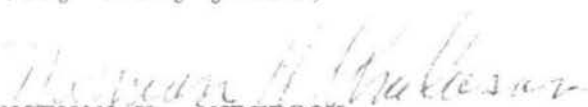
However, Section 311.090(2), RSMo 1959, provides that a \$2,000 bond be given for the faithful performance of all duties imposed upon the licensee by those applying for license to sell intoxicating liquor by the drink at retail for consumption on the premises. That section and Section 311.480(4), RSMo 1959, which provides for a \$1,000 bond from applicants requesting a license to permit the drinking or consumption of intoxicating liquor in, on, or about the premises have not been repealed by the aforementioned Senate Bills. Therefore, applicants for licenses pursuant to Sections 311.090 and 311.480, supra, are still required by law to furnish the required bond as noted in the respective sections with their applications.

CONCLUSION

Applicants for licensure to sell intoxicating liquor by the drink at retail for consumption on the premises pursuant to Section 311.090(2), RSMo 1959, and to applicants for licensure to permit the drinking or consumption of intoxicating liquor in, on, or about the premises pursuant to Section 311.480(4), RSMo 1959, are required by law to post bond as required by such sections.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gerald L. Birnbaum.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

COLLEGES: State college or university may establish
RELIGION: courses, a division or department of religion
SCHOOLS: for the purpose of teaching about religion
as distinguished from the teaching of religion.
The courses offered, as well as all courses of the institution,
both in plan and practice must maintain strict religious neutrality
as defined by the courts.

Opinion No. 313-1968

November 21, 1968



Mr. E. C. Curtis
Attorney for Southwest
Missouri State College
650 N. Jefferson
Springfield, Missouri

Dear Mr. Curtis:

This opinion is issued in response to your request for an official ruling. You submit the outline of a proposed Department of Religion to be established at Southwest Missouri State College and request our opinion regarding the constitutionality of the proposal.

This office has previously ruled upon a similar proposal (Opinion 157, Traywick, 6/25/63, copy enclosed). We reaffirm the ruling of Opinion 157. However, some additional comment may assist in the understanding and application of that opinion.

Our discussion must be limited to legal principles applicable to the proposal as a whole and not to the approval or disapproval of the particular courses in the Department of Religion proposal. Whether or not a particular college course violates constitutional standards can only be determined in the concrete. The determination cannot be made merely from course titles and outlines of proposals. All the particular facts would need to be weighed and evaluated. The course content, purpose, text, manner of presentation, etc. would all affect the determination. Opinions of this office can appropriately deal only with questions of law. The opinion procedure is not an appropriate means for resolving factual questions. Therefore, we must limit our ruling to the legal questions presented and the legal principles which would be applicable to particular situations.

Mr. E. C. Curtis

It is our view that a state college or university may establish a Department of Religion for the purpose of teaching about religion as distinguished from the teaching of religion. The courses offered within such department, as well as courses offered in any other department of the institution, must be conducted with religious neutrality. Neutrality forbids not only governmental preference of one religion over another, but also preference of religion over nonreligion. Neutrality requires the state not to favor religion; it equally requires the state not to be the adversary of religion, Everson vs. Board of Education, 330 U.S. 1, 18; Torcaso vs. Watkins, 367 U.S. 488, 495.

Although in borderline cases there may be a "delicate, almost imperceptible line between the permissible and the impermissible", there are some clear landmarks by which a lawful course may be plotted. We shall endeavor to outline the judicially established guides.

1. The curriculum of public education must not include any religious ceremony or exercise. Religious exercises in government schools and colleges such as devotional Bible reading or prescribed prayers are in violation of the Establishment Clause of the First Amendment of the United States Constitution. Abington School District vs. Schempp, 374 U.S. 203; Engel vs. Vitale, 370 U.S. 421. Our state Supreme Court has also held unlawful the conducting of religious exercises or religious instruction in the public schools, Harfst vs. Hoegen, Mo., 163 SW2d 609; Berghorn vs. Reorganized School District No. 8, Mo., 260 SW2d 573.

2. Neither public funds nor public facilities may be used to support instruction of any religion. Our State Constitution expressly prohibits the use of public funds to support instruction in any religion. Article I, Section 7 and Article IX, Section 8, Harfst, supra, Berghorn, supra. Long ago the Missouri Supreme Court held a public school district could not build and furnish a school building for the purpose of teaching Sunday School religion classes. Dorton et al vs. Hearn, 67 Mo. 301 (1878).

3. To regard every involvement of religion with government and public education as unconstitutional is erroneous. Simple observation demonstrates that there cannot be in every respect an absolute separation of religion and government. Religion is an inseverable element of American life and society. In the words of the Court, "We are a religious people whose institutions presuppose a Supreme Being," Zorach vs. Clauson, 343 U.S. 306, 313. " * * * The history of man is inseparable from the history of religion" Engel, supra at 434.

Justice Jackson in Illinois ex rel McCollum vs. Board of Education, 333 U.S. 203, stated,

Mr. E. C. Curtis

" . . . I think it remains to be demonstrated whether it is possible, even if desirable, . . . to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps the subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete even from a secular point of view * * * The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity--both Catholic and Protestant--and other faiths accepted by a large part of the world's peoples."

Apart from its religious significance, the Bible is a writing of unquestionable moral, historical and literary importance. Regardless of their theological views and teaching, Abraham, Christ and Luther all shaped the course of western civilization. Perhaps the most pointed demonstration of the inseparability of religion and American government are the historical events and religious-political theories which produced the First Amendment. It was a religious people who ordained this Great Principle of Freedom of Religion.

4. Public education may include instruction about religion. Dicta pronouncements of the United States Supreme Court in the Schempp and Engel cases, which were quoted at length in our Opinion 157-63, clearly state that public education may include courses of study such as comparative religion, history of religion, relation of religion to civilization, literary and historical qualities of the Bible so long as these courses are objectively presented as a part of the secular education program.

Subsequent to our 1963 ruling, the Supreme Court of Washington passed upon a college English literature course dealing with the literary features of the Bible. The Court held that neither the Federal nor State constitutional provisions prohibiting government established religion or the use of public money in support of religion were violated. Calvary Bible Prebysterian Church et al vs. Board of Regents University of Washington, Wash., 436 P2d 189 (1967).

We think the constitutional test (perhaps over simply stated)

Mr. E. C. Curtis

is: Religion may be the subject of public education, but not the end.

5. Regardless of the title or plan of a particular course, it must be taught in practice with religious neutrality. One need not teach about religion to violate the First Amendment. The historian in his treatment of the Inquisition or the Reformation may inject sectarian views. The biologist discussing evolution may urge his own religious beliefs. The sociologist discussing control of population may offend certain religious opinions. All such practices would be unlawful. Indoctrination or proselyting in sectarian and religious views is just as constitutionally objectionable if done as part of a history, literature or other secular course. On the other hand, an objectively pursued course does not become constitutionally objectionable merely because it includes as a subject for study religious ideas, literature, persons or events.

Public educators when dealing with courses which involve religion directly or indirectly should exercise the utmost caution and discretion to present the subject matter with religious neutrality. To proffer personal opinions as absolute facts is intellectually dishonest and academically objectionable. When the subject is religion, such practices are in addition unconstitutional.

6. The primary effect test. In Schempp, supra, the Court expressed the following test for distinguishing between forbidden involvements of the state with religion and those involvements permitted under the Establishment Clause, 1.c. 222,

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Court has continued to apply this test. Board of Education vs. Allen, ___ U.S. ___, 20 LEd 2d 1060 (1968).

We note that the courses in the curriculum outline enclosed with your letter of request deal predominately with Christian religions. There is no course offering dealing with non-Judaeo-Christian religions. We also note that the faculty is to be composed of those "trained in the discipline of religion" apparently to the exclusion of other disciplines such as literature, history,

Mr. E. C. Curtis

etc. We do not say that these facts violate the Constitution. We merely call to your attention that these, if combined with other facts, may raise questions as to whether or not religious neutrality is maintained.

CONCLUSION

It is the opinion of this office that a state college or university may establish courses, a division or Department of Religion for the purpose of teaching about religion as distinguished from the teaching of religion. The courses offered (as well as all courses at the institution) both in plan and practice must maintain strict religious neutrality as defined by the courts.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enc. Opinion No. 157
Traywick, 6/25/63

STATE LIBRARY
FEDERAL-STATE AGREEMENTS:
LIBRARY SERVICES AND CON-
STRUCTION ACT (20 USC 351):

Review and certification of Amendment
(June 12, 1968) to Missouri State
Plan under the Library Services and
Construction Act, 20 USC 351 as amended
by Public Law 89-511.

Opinion No. 314-68 Revised
Answered by Letter
DeFeo

August 2, 1968

Mr. Charles O'Halloran
State Librarian
308 East High Street
Jefferson City, Missouri 65101

Dear Mr. O'Halloran:

On June 25, 1968, this office reviewed and certified the Amendment to the Missouri State Plan for Library Programs and Other Library Services and Construction (dated June 12, 1968), which Plan was prepared under the Library Services and Construction Act, 20 USC 351 et seq. as amended by Public Law 89-511.

By letter of July 29, 1968, you inform that it has been necessary to make a minor technical change in the Amendment subsequent to our certification. You therefore request revision of our opinion letter to include a recent change. The change is made in Plan Section 3.1 and contains a statement of the State's policy regarding the purchase of existing buildings for Library use.

We hereby certify that the 1968 Amendment of the State Plan, including the change in Plan Section 3.1 (dated July 24, 1968), and the whole State Plan as amended is consistent with State law. All quotations, citations, and interpretations of State laws made in the Amendment are correct.

We are returning herewith a copy of the revised Plan Section 3.1.

This revised opinion letter constitutes our official certification of the Amendment to the State Plan and should be inserted in the appropriate place in each copy thereof.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

FEDERAL-STATE AGREEMENTS:
ELEMENTARY AND SECONDARY
EDUCATION ACT OF 1965:
STATE BOARD OF EDUCATION:

Review and certification of the appli-
cation by the State Board of Education
for Grant (dated June 19, 1968) under
Title V of the Elementary and Secondary
Education Act of 1965, 20 USC 861, et seq.

Opinion No. 315-68
Ans. by Letter
DeFeo

June 28, 1968



Mr. Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Dear Commissioner Wheeler:

Per your request, we have reviewed the State Board of Education Application No. 1, FY 1969 (dated June 19, 1968) for a Grant to Strengthen the State Department of Education under Title V of the Elementary and Secondary Education Act of 1965, P.L. 89-10 as amended by P.L. 90-247 (20 USC 861, et seq.).

Our review has taken into consideration the above federal laws; the federal regulations (45 CFR 119); Article IX, Section 2(a) Missouri Constitution; Section 161.092, RSMo. Supp. 1967, and related provisions.

It is the opinion of this office that the Missouri State Board of Education is the agency of Missouri primarily responsible for state supervision of public elementary and secondary schools and is the agency most nearly meeting the definition of "State Education Agency" in Section 601(k) of P.L. 89-10; that the State Board has authority under state law to submit and administer the programs, projects and activities set forth in the State Application No. 1, FY 1969; and that all the provisions of the Application are consistent with state law.

This letter opinion constitutes our official certification of the Application and should be inserted in the proper place in each copy.

We are returning herewith one copy of the Application.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

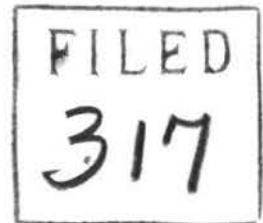
ELECTION LAWS:
ABSENTEE VOTING:
HOME REGISTRATION:
BOARD OF ELECTION COMMISSIONERS,
AUTHORITY REGARDING VOTER
QUALIFICATIONS:

Regardless of a registering voter's answers to questions recorded in the files of the Kansas City election board which reveal information regarding disability or literacy, absentee ballots properly applied for under the provisions of Chapter 112 must be supplied

to the potential voter, and must be counted if properly cast.

OPINION NO. 317

July 16, 1968



Mr. Fred A. Murdock
Chairman
Board of Election Commissioners
Kansas City, Missouri

Dear Mr. Murdock:

This opinion is in response to your inquiry regarding certain procedures of your Board in connection with absentee voting by persons properly registered, particularly those registered under the new home registration provisions of Section 117.290 (2), RSMo Cum. Supp. 1967. As you stated in your letter, your specific request is:

"If the voting and registration records maintained by this Board affirmatively disclose that a registered, duly qualified elector is unable to mark an absentee ballot without assistance due either to illiteracy or physical incapacity, should the Board honor such elector's request for issuance of an absentee ballot and, if so, should the Board permit such a ballot to be counted when cast?"

You further advise that your Board uses registration forms containing the following questions:

"Can you read and write?"

"Have you any disability preventing you from marking your ballot or operating a voting machine?"

"If so, what?"

Mr. Fred A. Murdock

It seems to us that to answer your question fully, we need to inquire into what power and duties your Board possesses under the law regarding voter qualifications, registration and absentee ballot procedures.

Section 117.290 (2), RSMo Supp. 1967, reads:

"2. Upon receipt of written requests from applicants who are otherwise entitled to vote but who are physically incapacitated and unable to go to places of registration, the board shall send two registration officers to the homes of such applicants. The registration officers must be of opposite political parties. The validity of each request shall be determined by the board. The board may establish rules and regulations as it may deem necessary in order to give effect to this section."

General registration procedures for Kansas City are contained elsewhere in Chapter 117, RSMo. In particular, Section 117.300, RSMo 1959, enumerates the information which is to be requested from registration applicants. The questions you employ regarding alleged disability or literacy are not there listed.

Qualifications for voting are listed in the Constitution of Missouri, Article VIII, Section 2:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty days next preceding the election at which they offer to vote, are entitled to vote at all elections by the people. Citizens of the United States who are otherwise qualified to vote under this section and who have resided in this state sixty days or more, but less than one year, prior to the date of a presidential election may be permitted by law to vote for presidential and vice presidential electors at such election but for no other officers. No idiot, no person who has a guardian of his or her estate or person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting.* * *"

Mr. Fred A. Murdock

Applicable to Kansas City is Section 117.040, RSMo 1959, which contains basically the same language and implements these constitutional qualifications.

In Section 112.030, RSMo Cum. Supp. 1967, regarding applications for absentee voting, we find the following language:

"* * * * that no county clerk, board of election commissioners or other proper official charged with the duty of furnishing such ballots after examination of the records or otherwise ascertaining the right of such person to vote at such election shall be required to furnish any ballot or ballots to any person desiring to vote who is not lawfully entitled to vote,* * *"
(emphasis added)

We conclude that the Board's authority to establish registration procedures by which to rule on voter qualifications is limited to the qualifications set out in the Missouri Constitution and applicable statutes; neither literacy nor health is such a qualification.

Although your Board certainly has rule-making authority, we do not believe it has the power to withhold issuance of absentee ballots properly applied for. The Supreme Court of Kansas held regarding soldiers' absentee voting that the secretary of state's rule-making authority did not authorize him to fix voter qualifications (Johnson v. Russell, 1945, 160 Kan. 91, 159 P.2d 480).

We deem it unnecessary to determine whether the election board has the authority to promulgate rules requiring an individual to answer questions on the registration forms as to his literacy or a disability which allegedly might prevent his marking a ballot or operating a voting machine, because such information would not authorize the refusal of the board to send an absentee ballot to such individual if he properly applies for such ballot; nor would such information authorize the refusal of those counting absentee ballots to count the ballot of such individual, if the ballot was properly cast.

Section 112.040, RSMo 1959, requires the absentee voter to swear he has marked his absentee ballot "in secret". The actual technique of voting absentee ballots, as mentioned in your request to us, is set out in Section 112.050, RSMo 1959:

Mr. Fred A. Murdock

"The absent voter shall make and subscribe to the affidavits provided for on the return envelope for the ballot before any officer authorized by law to administer oaths; and the voter shall exhibit the ballot to the officer unmarked, and shall thereupon in the presence of the officer and of no other person mark the ballot or ballots, but in such manner that the officer cannot see or know how it is marked. The ballot or ballots shall then in the presence of the officer be deposited in the envelope and the envelope securely sealed. The officer shall then write or print upon the envelope the following: 'Absentee ballot of (insert name of voter) marked and sealed in my presence', which certificate shall be signed by the officer and his official title noted thereon. The envelope shall be sent by mail by the voter, postage prepaid, to the officer issuing the ballot, and for the ballot to be effective and eligible to be counted the envelope containing it shall bear a postmark not later than the date of the election and shall be delivered to the issuing official not later than six o'clock p.m. of the day next succeeding the day of such election, or the ballot may be delivered in person to the issuing official, who shall give his written receipt therefor, not later than six o'clock p.m. of the date of the election. No charge shall be made by any officer in this state for the acknowledgement of affidavits prescribed in this chapter."

These sections clearly indicate that the intent of the statutes is that the marking of the ballot be the voter's own act. In a previous opinion to you, No. 500, 11/3/66, we held Chapter 112 to be mandatory in application, and that it requires strict following by the voter regarding application and completion of the balloting procedure. This office has also previously held that the notary public authenticating the ballot may not assist the voter in marking it (No. 96, White, 8/20/54, enclosed), but that it is proper to apply for an absentee ballot by means of an authenticated X-mark rather than a signature (Opinion to your Board, No. 151, 10/24/67).

Mr. Fred A. Murdock

However, neither the mandatory statutes nor the common law provide that a voter be disenfranchised before the fact or prevented from even having the chance to attempt to vote, because of some alleged "disability" or illiteracy which does not legally disqualify him from voting. Quite the contrary, the above statutory provisions on registration and absentee voting in our judgment indicate strong legislative intent that the allegedly "disabled" or illiterate person be given every possible opportunity to cast his ballot, if otherwise a qualified voter. Certain irregularities, of course, may void an absentee ballot in a given election, but this is a matter to be settled by the appropriate election officials or in the courts where authorized by statute. An example of an election contest regarding absentee ballot irregularities is that involved in Elliot v. Hogan, Me. App. 1958, 315 S.W. 2d 840.

CONCLUSION

It is the opinion of this office that regardless of a registering voter's answers to questions recorded in the files of the Kansas City election board which may reveal information regarding alleged disability or literacy, absentee ballots properly applied for under the provisions of Chapter 112 RSMo must be supplied to the potential voter, and must be counted if properly cast.

The foregoing opinion, which I hereby approve, was prepared by my assistant, William L. Culver.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

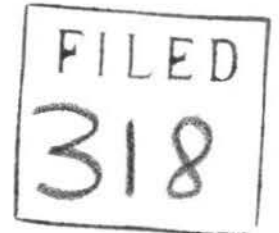
Enclosure: Op. No. 96-White-8/20/54

LEVEE DISTRICTS:
DRAINAGE DISTRICTS:
COOPERATION AMONG POLITICAL
SUBDIVISIONS:
INTERSTATE AGREEMENTS:

Section 70.220, RSMo 1959 authorizes drainage and levee districts of the State of Missouri to contract with and enter into agreements with levee districts from other states and also with authorized agencies of the United States.

OPINION NO. 318

August 1, 1968



Honorable Bernard W. Gorman
Prosecuting Attorney
Atchison County
101½ South Third
Tarkio, Missouri

Dear Mr. Gorman:

This is in answer to your letter of June 18, 1968, asking this office for an opinion as to whether drainage and levee districts have the authority to enter into interstate agreements and contracts with political subdivisions of other states, and also with the United States. Apparently, the agreement with which you are concerned would bring together levee districts from Missouri, Nebraska and Iowa for the purpose of building a common levee across state lines.

Section 70.220, RSMo 1959 reads as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be

Honorable Bernard W. Gorman

within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (emphasis added)

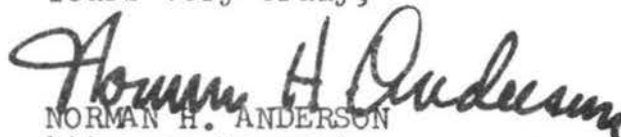
It is clear that Section 70.220, which closely parallels Article VI, Section 16, Constitution of Missouri, authorizes political subdivisions of the State of Missouri to enter into contracts and agreements with duly authorized agencies of the United States and also with the political subdivisions of other states. Section 70.210, RSMo 1959, subsection 2, contains a definition of the term "political subdivision". It specifically includes drainage and levee districts. There can be no doubt but that drainage and levee districts are included in the purview of Section 70.220. Since this section authorizes political subdivisions of the State of Missouri to contract with political subdivisions of other states and with the United States, we are of the opinion that the drainage and levee districts with which you are concerned may contract with such districts in the states of Nebraska and Iowa in order to effectuate their common purpose where that purpose is within the scope of the powers of the drainage and levee districts as it is here.

CONCLUSION

Therefore, it is the opinion of this office that Section 70.-220, RSMo 1959 authorizes drainage and levee districts of the State of Missouri to contract with and enter into agreements with levee districts from other states and also with authorized agencies of the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gary G. Sprick.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

FEDERAL-STATE AGREEMENTS:
ELEMENTARY AND SECONDARY
EDUCATION ACT OF 1965:
STATE BOARD OF EDUCATION:

Review and certification of State
Plan (June 19, 1968) submitted under
Title III, Elementary and Secondary
Education Act of 1965, PL 89-10 as
amended by PL 90-247.

Opinion No. 319-68
Ans. by letter
DeF

June 28, 1968

Mr. Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101



Dear Commissioner Wheeler:

Per your request, we have reviewed the Missouri State Plan (dated June 19, 1968) prepared for submission to the United States Commissioner of Education under Title III of the Elementary and Secondary Education Act of 1965 (P.L. 89-10 as amended by P.L. 90-247).

Our review has taken into consideration the above-cited federal laws together with the federal regulations (45 CFR 118, draft of April 25, 1968); Article III, Section 38(a), Article IX, Section 2(a), Missouri Constitution; Section 161.092, RSMo. Supp. 1967 and related provisions.

From the foregoing it is the opinion of this office that:

(1) The Missouri State Board of Education is the state educational agency required by Section 305(a) (1) (C) of P.L. 89-10 as amended by P.L. 90-247;

(2) The State Board has authority under state law to submit this State Plan pursuant to Section 305 of P.L. 89-10 as amended by P.L. 90-247;

(3) All provisions with respect to use of federal funds can be carried out in this state;

(4) The Commissioner of Education has been duly authorized by the Missouri State Board of Education to submit the present State Plan and to represent the Board in all matters pertaining thereto.

Mr. Hubert Wheeler
Page 2
June 28, 1968

This opinion letter constitutes our official certification of the State Plan and should be inserted at the proper place in all copies.

We are returning herewith one copy of the State Plan.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

LCDJr:rs

Enc.

MINES:

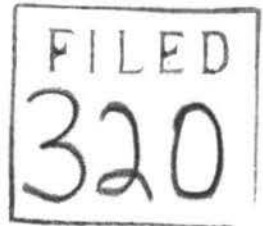
DIVISION OF MINE INSPECTION:

The scope of the authority of the Division of Mine Inspection to inspect plants operated in conjunction with the mining of certain minerals is as follows:

Lead Ore - All operations prior to shipment to the smelter which includes taking the ore from the ground and reducing it to a concentrate; Clay - All operations at the minesite prior to shipment to the kilns or refractories; Shale - All operations at the minesite prior to shipment to the cement plants or other available markets; Iron Ore - All operations prior to shipment to the steel mills which includes reduction to concentrate and formation of pellets; and Silica Sand - All mining and crushing operations at the minesite.

OPINION NO. 320

September 3, 1968



Honorable Don Davis
Director
Division of Mine Inspection
Capitol Building
P. O. Box 419
Jefferson City, Missouri

Dear Mr. Davis:

This is in response to your request for an opinion concerning whether the Division of Mine Inspection has the authority to inspect the plants (mills) operated in conjunction with mines engaged in the mining of the following minerals: lead, clay, shale, iron and silica sand.

The applicable statutory provisions relating to mine inspection are found in Chapter 293, RSMo 1959. In this connection, Section 293.010, subsection 6, reads as follows:

* * * * (6) "'Non-coal mine', any open-pit or underground excavation from which minerals, as defined in this section, except coal are extracted for commercial purposes, including the mining plant and all parts of the property of such mine, on the surface or underground;"

Also, Section 293.660, Subsection 1, provides as follows:

"Each mine in this state shall be examined by a mine inspector at least twice in every calendar year, and more frequently if it is deemed necessary or desirable in order to enforce the provisions and fulfill the intent of this chapter."

Honorable Don Davis

The minerals which are the subject of this opinion have a common characteristic in that they all go through a process whereby they are mined from the ground and subsequently manufactured into a product which is sold on the market. The Division of Mine Inspection is authorized to make inspections only during the mining process. Thus, the determination to be made with regard to each of the minerals in question is at what point the mining process ends and the manufacturing process begins.

The subject matter of Chapter 293, RSMo 1959 as amended, generally deals with the regulation of miners, mining, and caves. It may be stated that such legislation is remedial in nature and should be liberally construed since it was enacted for the benefit and protection of men engaged in a hazardous occupation. Welch v. Kansas City Midlanding Coal and Mining Company, (Mo. 1910), 132 S.W. 49, 50. The term "mining" is a broad term and may apply to various methods of extracting natural products from beneath the soil. Ingle v. City of Fulton (Mo. 1954), 268 S.W. 2d 600, 604.

The word "manufacture" is variously defined in the books, but, as commonly used and understood, it means to work, as raw or partly wrought materials, into suitable forms for use. Coffman et al v. Seyforth et al (Mo. 1947), 200 S.W. 2d 594. The United States Supreme Court in East Texas Lines v. Frozen Food Express, 351 U S 49, 100 L. Ed. 917, 76 S.Ct. 574 stated:

" . . . Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U.S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" (emphasis added)

Lead Ore

This mineral is mined from the ground and reduced to a concentrate at the mine site. Subsequently it is shipped to a smelter where it is made into pig lead and then shipped to manufacturers to be made into finished products.

Missouri has no definitive cases in this area, but the problem has been considered by the federal courts. It has been held that milling and reducing ore does not come within the commonly accepted meaning of the word "manufacturing". In Re Rollins Gold and Silver Min. Co. 102 F. 982. The Court in that case described the reducing process as separating and extracting the natural product from the mass which would clearly encompass the process of reducing the ore to a concentrate before shipping to a smelter.

Honorable Don Davis

The question of whether smelting is still part of the mining process was considered by the District Court for the Southern District of California in the case of In Re Tecopa Mining and Smelting Co., 110 F. 120, 121. There the Court said:

"* * * *Has the corporation here, by smelting, made or formed anything useful? It has changed the form of the ore, by eliminating useless matter, into that which is useful; and the product has another name, being ore no longer, but 'pig' or bullion, and having a market value depending upon its assay. In a strict sense, man can create nothing. He can only alter the form of existing things. The ore, when taken from the mine by the process of mining, is changed neither in form nor in substance, unless breaking may be termed a change of form. It is ore, still. But when smelted it is ore no longer, in form, and the substance is altered by taking away some of its component parts. There has been alteration, and that by human hands and machinery. To my mind, it comes clearly within the popular definition of 'manufacturing.'"

Based on this authority it appears that the mining process ends and the manufacturing process begins when the lead ore is shipped to the smelter.

Clay

This mineral is treated differently once it is taken from the ground depending upon its end use. Clay that is to be mixed for cement is taken from the mine to a kiln where it is heated and consequently formed into a powder. The powder is then sold to cement plants. Other clay is hauled from the mine to refractories where it is made into firebrick, brick, and tile.

It is clear that the mining process ends when the clay is shipped to a refractory since the refractories manufacture a finished product. As for the clay that is shipped to kilns, it appears that this, too, is the end of the mining process. When the clay is taken from the ground it is in its natural state and unfit for use. Once it is heated and formed into a powder at the kiln, it is transformed into a product that is usable as a component part of certain cement mixes. This seems well within the requirement of manufacturing that there be a transformation and emergence of a new and different article having a distinctive name, character, or use. East Texas Liner v. Frozen Food Express, 351 U S 49, quoted supra.

Shale

Shale is taken from the ground and shipped to cement plants for mixture with limestone, clay, and other products to make cement.

Cement is a finished product thus the processing at the cement plant fits into the standard definition of manufacturing.

Therefore, the mining process ends when the shale is transferred from the mine site.

Honorable Don Davis

Iron Ore

Iron ore, is taken from the ground, concentrated, rolled into pellets at the mine site. Subsequently it is shipped to steel mills where it is melted down and made into various types of steel for manufacturing.

The reduction of the ore to a concentrate and the rolling of it into pellets is done strictly for efficiency in shipping. There is no emergence of a new and different article as discussed in East Texas Lines v. Frozen Food Express, supra. The pellets are still iron ore, the only change being that it is concentrated. As stated in the portion of this opinion dealing with lead ore, the milling and reducing of ore to a concentrate does not come within the commonly accepted meaning of the word "manufacturing". In Re Rollins Gold & Silver Min. Co., supra.

When the ore pellets are shipped to the steel mills, they enter the manufacturing process since they are melted down and made into steel which is clearly a new and different article having a distinctive name and use.

Silica Sand

This mineral is mined from the ground and crushed at the mine site. In some instances it is shipped for commercial use, but Pittsburgh Plate Glass Co. pumps the sand directly from the mine to their plant where it is manufactured into glass.

Clearly when the sand is shipped from the mine or pumped into the plants run by Pittsburgh Plate Glass Co., the mining process has ended since the sand will be used in various manufacturing processes.

With regard to the crushing of the sand it appears that this is still part of the mining process. There is no new and different article produced by this operation nor is the substance of the original article altered. This process is much like the milling and reduction of ore which has already been discussed in this opinion as not being part of the manufacturing process. In Re Rollins Gold & Silver Min. Co., supra.

CONCLUSION

Therefore it is the opinion of this office that the scope of the authority of the Division of Mine Inspection to inspect the plants operated in conjunction with the mining of certain minerals is as follows:

Lead Ore:

All operations prior to shipment to the smelter which includes taking the ore from the ground and reducing it to a concentrate.

Clay:

All operations at the minesite prior to shipment to the kilns or refractories.

Honorable Don Davis

Shale:

All operations at the minesite prior to shipment to the cement plants or other available markets.

Iron Ore:

All operations prior to shipment to the steel mills which includes reduction to concentrate and formation of pellets.

Silica Sand:

All mining and crushing operations at the minesite.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Yours very truly,

A handwritten signature in black ink, appearing to read "Norman H. Anderson". The signature is fluid and cursive, with the first name "Norman" being more prominent.

NORMAN H. ANDERSON
Attorney General

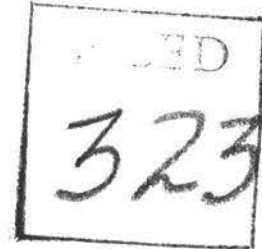
ELEMENTARY & SECONDARY
EDUCATION ACT OF 1965:
FEDERAL GRANTS:
STATE BOARD OF EDUCATION:

Review -- certification of State Appli-
cation for State Plan Preparation and
State Advisory Council Activities under
Title III, PL 89-10 as amended by PL 90-247

Opinion No. 323-68
Answered by Letter
DeFeo

June 25, 1968

Mr. Hubert Wheeler, Commissioner
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101



Dear Commissioner Wheeler:

Per your request, we have reviewed the State Application for State Plan Preparation and State Advisory Council Activities under Title III, PL 89-10, as amended by PL 90-247.

This office has previously reviewed and approved a substantially identical application under this same program (Opinion Letter No. 244-68, Wheeler, 4/23/68).

We hereby certify that the Missouri State Board of Education has the authority under state law to perform the duties and functions of a state education agency under Title III of PL 89-10, as amended by Section 131 of PL 90-247, including those duties and functions arising from the assurances given in the above-mentioned application.

The present certification relates only to the instant application for state plan preparation and is not a review or certification of the state plan to be submitted under Title III as amended.

We are returning herewith the original copy of the application. In accord with this opinion letter, we have executed the appropriate certification.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

LCDJr:rs

Enc.

FIREARMS: The "Spitfire" 45 caliber carbine manufactured by the
MACHINE GUNS: Spitfire Manufacturing Company, Phoenix Arizona, is a
machine gun, possession of which is a felony under provisions of Section 564.590, RSMo, except possession by members of police departments, sheriffs, city marshals or the military or naval forces of this state or the United States in the discharge of their duties.

OPINION NO. 326

September 19, 1968

Honorable James S. Corcoran
Circuit Attorney, City of St. Louis
Municipal Courts Building
St. Louis, Missouri 63103



Dear Mr. Corcoran:

This is in response to your request for an opinion concerning whether the "Spitfire" 45 caliber carbine is a machine gun, possession of which is a felony under provisions of Section 564.590, RSMo.

According to Internal Revenue Rev. Rul. 68-368, the Spitfire carbine was determined by tests and examination to be a weapon which is capable of automatically firing more than one shot without manual reloading and by a single function of the trigger, and therefore was found to be a machine gun as defined by 26 U.S.C. § 5848(2). As stated by the Ruling: "Examination and test-firing of the Spitfire carbine disclosed that the design of the weapon's sear and safety lever are such that when the safety lever is depressed at the time the trigger is pulled, the sear will jam in its lowered position and cause automatic firing. * * * "

Section 564.600, RSMo 1959, which is almost identical to § 5848(2), defines a "machine gun" as a gun " . . . capable of discharging automatically and continuously loaded ammunition of any caliber . . . by means of clips . . . "

United States v. Kokin, 365 F.2d 595 (3d Cir. 1966) holds that, a carbine, in itself not a machine gun, together with all parts necessary to convert it into a type of machine gun constitutes a machine gun within 26 U.S.C. § 5848(2). See also United States v. Cosey, 244 F.Supp. 100 (1965); and Precise Imports Corporation v. Kelly, 378 F.2d 1014 (1967), for similar holdings.

Section 564.590, RSMo 1959, provides that possession of a "machine gun" is a felony with punishment from two to thirty years or by fine not to exceed \$5,000 or by both fine and imprisonment.

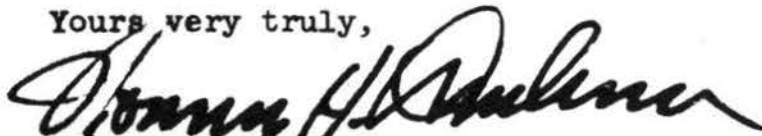
Honorable James E. Corcoran

CONCLUSION

The "Spitfire" 45 caliber carbine manufactured by the Spitfire Manufacturing Company, Phoenix Arizona, is a machine gun, possession of which is a felony under provisions of Section 564.590, RSMo, except possession by members of police departments, sheriffs, city marshals or the military or naval forces of this state or the United States in the discharge of their duties.

The foregoing opinion which I hereby approve, was prepared by my assistant Howard L. McFadden.

Yours very truly,



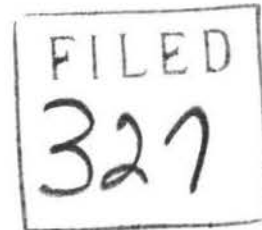
NORMAN H. ANDERSON
Attorney General

SHERIFFS: Neither the sheriff of a third class county
ELECTIONS: nor his deputies are required to be present
VOTING PLACES: at each voting place during the entire election
day.

OPINION NO. 327

August 1, 1968

Honorable Edison Kaderly
Prosecuting Attorney
Barton County Courthouse
Lamar, Missouri 94759



Dear Mr. Kaderly:

This is in response to your question concerning whether it is necessary for the sheriff of a third class county, or his deputies, to be in continuous presence at each voting precinct all during the election day.

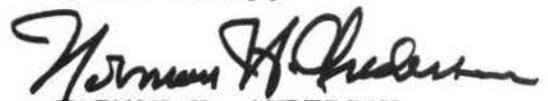
Our review of the law and prior opinions issued by this office indicates that there is no statutory requirement that the sheriff or his deputies be in continuous presence at each voting place, and no such requirement may be reasonably inferred.

CONCLUSION

It is the opinion of this office that neither the sheriff of a third class county nor his deputies are required to be present at each voting place during the entire election day.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Klaffenbach.

Yours truly,


NORMAN H. ANDERSON
Attorney General

ELECTIONS:
LIQUORS:
INTOXICATING LIQUORS:
LIQUOR CONTROL:

Wholesalers may lawfully make deliveries of liquor and beer to retailers on election days.

OPINION NO. 328

October 18, 1968

Honorable Jack J. Schramm
State Representative
St. Louis County - 37th District
7529 Gannon Avenue
University City, Missouri 63130



Dear Representative Schramm:

Reference is made to your letter requesting a formal opinion of this office as follows:

"Is there any provision under Missouri Statutes prohibiting the delivery of intoxicating liquor, intoxicating beer, and non-intoxicating beer to retail outlets on the day of any election? Sections 311.290 and 311.480 of the Missouri Statutes prohibit drinking or consumption on election days but seem to be silent on the question of delivery from wholesaler to retailer."

Further information in regard to this matter has been developed by telephone conversation with you. It is our understanding that the deliveries of liquor and beer about which you have inquired are made pursuant to sales agreements between wholesalers and retailers. Deliveries are made by trucks owned by the wholesalers and operated by employees of the wholesalers. Regular daily delivery schedules are maintained to various retail outlets. If the wholesalers are not permitted to make deliveries on election days, regular delivery schedules must be revised and the cost of deliveries is increased by reason of additional equipment and personnel required to make up deliveries which ordinarily would have been made on election day.

The applicable statutory provisions are set forth in Section 311.290, RSMo Cum. Supp. 1967. The relevant provisions of the cited statute are as follows:

Honorable Jack J. Schramm

"No person having a license under this law nor any employee of such person shall sell, give away or otherwise dispose of, or suffer the same to be done upon or about his premises, any intoxicating liquor in any quantity * * * after 1:30 a.m. upon the day of any general, special or primary election in this state * * * or after 1:30 a.m. upon the day of any county, township, city, town or municipal election * * * . * * * the sale of intoxicating liquor may be resumed * * * on any such election day after the expiration of thirty minutes next following the hour or time fixed by law for the closing of the polls at any such election. * * * " (emphasis added)

It is noted that the statute prohibits a person having a license from selling intoxicating liquor on election days upon or about his premises. The deliveries of intoxicating liquor by wholesalers to retailers are performed pursuant to a sales agreement. The question for our consideration becomes whether or not such deliveries constitute sales upon or about the licensed wholesalers premises. An examination of the cases in Missouri courts discloses that a sale of intoxicating liquor is not completed until delivery is made. The cases on the subject are collected and discussed in Clark v. Crown Drug Co. (Springfield Appeals), 146 S.W.2d 98. In the cited case plaintiff, a licensed liquor retailer, sought an injunction against defendant, a licensed liquor retailer, for the unlawful sales of liquor. The applicable statute prevented the sales of liquor in any other place than that designated in the license. The defendant was receiving orders for liquor by telephone at its licensed place of business and was delivering liquor pursuant to such orders to telephone customers at places other than the licensed place of business (presumably residences, apartments, etc.). Plaintiff contended that such sales were made at a place other than that designated in the license by reason of such deliveries and therefore, such sales were in violation of the statute. The court concluded that deliveries were part of the sale and that the sale was not completed until delivery was made. Inasmuch as delivery was at a place other than that designated in the license, the sale was not made on the licensed premises and was in violation of the statute. An injunction against the unlawful sales was issued.

Honorable Jack J. Schramm

Upon transfer to the Supreme Court the cited case was reversed. 152 S.W.2d 145. However, the reversal was based upon the grounds that the plaintiff had no legal right to an injunction. The court assumed but did not decide that the telephone sales violated the law. Therefore, the cited case, together with the cases collected therein, remains the law in this state that delivery is necessary to complete a sale of liquor.

In applying Clark v. Crown Co. to the facts under consideration and to Section 311.290, it is concluded that deliveries of liquor by a wholesaler to a retailer pursuant to a sales agreement do not constitute a sale of intoxicating liquor upon or about the wholesaler's premises and therefore, such deliveries on election days are not prohibited by Section 311.290.

The obvious purpose of Section 311.290 is to prevent the sale, gift or other disposition of intoxicating liquor upon licensed premises on days of elections. It appears that it was the intent of the legislature to prevent the use of intoxicating liquor as a corrupting influence in the conduct of elections. The tendency for the abusive use of liquor in elections is through retail establishments rather than through wholesale establishments because retail establishments rather than wholesale establishments are the outlets to the consuming public for intoxicating liquor. Therefore, the conclusion reached that a licensed wholesaler is not prohibited from delivering intoxicating liquor to licensed retailers on election days is consistent with and in harmony with the legislative intent.

Although a wholesaler is not prohibited from delivering intoxicating liquor to retailers on election days, other provisions of the statute make it necessary to consider whether or not licensed retailers are prohibited from receiving deliveries of liquor from wholesalers on election days.

Relevant provisions of Section 311.290, RSMo Cum. Supp. 1967, are as follows:

" * * * if said person has a license to sell intoxicating liquor by the drink, his premises shall be and remain a closed place as defined in his section after 1:30 a.m. (until thirty minutes after the polls close). * * * "

Honorable Jack J. Schramm

The section further provides as follows:

" * * * Where such licenses authorizing the sale of intoxicating liquor by the drink are held by clubs or hotels, this section shall apply only to the room or rooms in which intoxicating liquor is dispensed; * * * "

The section further provides as follows:

" * * * and where such licenses are held by restaurants whose business is conducted in one room only and substantial quantities of food and merchandise other than intoxicating liquors are dispensed, then the licensee shall keep securely locked during the hours and on the days herein specified all refrigerators, cabinets, cases, boxes and taps from which intoxicating liquor is dispensed. * * * "

The section further provides as follows:

" * * * A 'closed place' is defined to mean a place where all doors are locked and where no patrons are in the place or about the premises. * * * "

These statutory provisions must be considered in determining whether or not the licensees referred to therein can receive deliveries of intoxicating liquor during the prohibited times on election days. The provisions apply to premises upon which intoxicating liquor by the drink may be sold with modifications thereof for licenses held by clubs, hotels and restaurants.

These provisions of the statute should be construed with a view to accomplish the legislative intent. It appears that the legislature provided for a closed place to prohibit patrons from being on the premises and that an establishment be locked so as to keep patrons out. We do not believe that the legislature intended to prohibit a proprietor and his employees from being within the place of business during the prohibited hours to clean, repair, take inventory, keep reports and re-stock inventory so that the business may be prepared to serve its patrons when the premises may be lawfully opened for business purposes. The statute requires all doors to be locked and prohibits any patrons from being on the premises. The statute does not prohibit the proprietor and his

Honorable Jack J. Schramm

employees from being on the premises. If the statute were to be literally interpreted to require the doors to remain locked during the entire prohibited time, the proprietor and his employees performing lawful functions on the premises could not lawfully leave the premises during the prohibited time. Such an interpretation would be so absurd as to give a ridiculous meaning to the language of the statute. Therefore, this office concludes that although the doors must remain locked to patrons and that no patrons remain on the premises during the prohibited times, persons other than patrons may have ingress and egress to the premises for lawful purposes such as cleaning, repairing and deliveries of supplies including stocks of intoxicating liquor.

The conclusions above, which interpret a closed place as used in the statute, apply also to the room or rooms in which intoxicating liquor is dispensed in clubs or hotels. Such room or rooms must remain locked to patrons during the prohibited times but are lawfully accessible for the purposes of cleaning, repairing and receiving deliveries of stocks of intoxicating liquor.

The statutory provision in regard to restaurants which hold licenses for the sale of intoxicating liquor by the drink requires liquor refrigerators, cabinets, cases, boxes and taps to be securely locked during the prohibited times. This office concludes that the provision regarding the locking of containers in restaurants on election days applies only to prevent the taking of intoxicating liquor out of such containers and does not prevent the restaurant owner from opening such containers for the purpose of repair, maintenance, inventory and re-stocking.

Therefore, this office concludes that holders of licenses for the retail sale of intoxicating liquor may lawfully receive deliveries of intoxicating liquor from wholesalers on election days.

You have also inquired about the applicability of Section 311.480, RSMo 1959, to these questions. The cited section applies to licenses which permit the drinking or consumption of intoxicating liquor in places where food, beverage or entertainment is sold or provided. These places are commonly referred to as "set-up" places. Inasmuch as such places are not permitted to sell intoxicating liquor, licensed wholesalers would not have the occasion to make deliveries of intoxicating liquor to such places. Therefore, no question is raised concerning deliveries of intoxicating liquor to these places on election days.

Honorable Jack J. Schramm

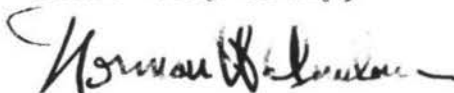
You have also inquired as to any provision of the statutes which prohibits the delivery of non-intoxicating beer to retail outlets on the day of any election. Chapter 312, RSMo, contains the laws in regard to non-intoxicating beer. These laws make no provision prohibiting the sales of non-intoxicating beer on election days. Therefore, the delivery of non-intoxicating beer by wholesalers to retailers on election days is not prohibited by law.

CONCLUSION

It is the opinion of this office that licensed wholesalers may lawfully make deliveries of intoxicating liquor (including intoxicating beer and non-intoxicating beer) to retail outlets on all election days; and that licensed retailers may lawfully receive deliveries of intoxicating liquor (including intoxicating beer and non-intoxicating beer) on election days.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

July 17, 1968

Honorable Jack K. Smith
Executive Secretary
Missouri Water Pollution Board
P. O. Box 154
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter dated June 3, 1968, submitting for our review the Missouri Water Pollution Board regulations to be adopted by the Board, which regulations relate to water pollution control project grants.

We have read the regulations and Chapter 204 Revised Statutes of Missouri 1959, as amended, and it is our opinion that these regulations are constitutional, and are within the statutory authority of the Missouri Water Pollution Board.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

AUDITS:
STATE AUDITOR:
SCHOOLS:

Because of the provisions of Section 174.240, RSMo Supp. 1967 placing the entire administration of the Jasper County Junior College District in the

hands of the Missouri Southern State College Regents, an audit by the State Auditor of Missouri Southern State College should include an audit of all expenditures by the Board of Regents in administering the first two years of college under the Jasper County Junior College District.

OPINION NO. 331 (1968)

October 29, 1968

Honorable Haskell Holman
Auditor for the State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Holman:

This is in answer to your request for an opinion, which is as follows:

"The Junior College District of Jasper County, Missouri, was constituted and created in accordance with the provisions of Sections 165.790 to 165.840, inclusive, Cum. Suppl., 1961, which now are Sections 178.770 to 178.890, Revised Missouri School Laws, 1966, on April 17, 1964.

"The Junior College District has been subsequently implemented to include the third and fourth college level courses (the fourth college level courses beginning with the 1968-69 school term), and are under the supervision of the Board of Regents of the Missouri Southern State College. The freshman and sophomore level courses are governed by the Board of Trustees of the Junior College District of Jasper County, Missouri.

"The Missouri Southern College is supported by an appropriation of the Missouri State Legislature and the first and second level courses are supported through the Junior College State Aid Act; however, the Board of Trustees are authorized to levy an additional tax without voter approval in support of the college courses in the manner set forth in Section 178.870, Cum. Suppl., 1967.

Honorable Haskell Holman

"The State Department of Education has established guide lines for the accounting procedures for Junior Colleges and has assumed that the laws governing six-director school districts are applicable to Junior College Districts. As a result, the Junior College District of Jasper County, Missouri, is required to file a copy of the biennial audit report with the State Department of Education as other six-director school districts to conform with the provisions of Section 165.121, Cum. Suppl., 1967.

"By reason of the foregoing circumstances, I shall appreciate your advice and official opinion in answer to the following question.

"1. Has the State Auditor the duty, right and authority to audit, examine and review the records of the Junior College District of Jasper County, Missouri?"

The State Auditor does audit and examine the accounts and records of the Missouri Southern State College at Joplin inasmuch as it is supported by funds appropriated by the legislature. We understand that in making such audit the State Auditor has found certain accounts to be apparently intermingled with the Jasper County Junior College District accounts. This is occasioned by the fact that the first two years of college are provided by the Jasper County Junior College District, and the last two years of college are provided by the Missouri Southern State College.

We believe that when the State Auditor makes an audit of Missouri Southern State College, the statutes require that an audit of all accounts of all four years of the college be made. It is true that there is a Board of Trustees for the Jasper County Junior College District and a Board of Regents for the Missouri Southern State College. However, Section 174.240, RSMo Supp. provides that the five member board of regents of Missouri Southern State College shall be responsible for the administration of the Missouri Southern State College and the Jasper County Junior College District including the powers and duties of the District Trustees to appoint employees, define and assign their powers and duties and fix their compensation. The Board of Regents has been given the responsibility for the administration of the Missouri Southern State College and the Jasper County Junior College District and therefore, when the Missouri Southern State College accounts and records, which are under the control of the Missouri Southern State College Board of Regents, are audited, Section 174.240, RSMo Supp. requires that the accounts of

Honorable Haskell Holman

the College under control of the Board of Regents be audited which includes accounts of the Jasper County Junior College District administered by the Board of Regents of Missouri Southern State College.

Missouri Southern State College is audited under the provisions of Section 29.200, as a state institution, and we believe that since the Board of Regents of Missouri Southern State College has entire control of both Missouri Southern State College and the Jasper County Junior College District administration, the expenditure of funds and control of funds of both the Missouri Southern State College and the Jasper County Junior College District by the Missouri Southern State College Regents requires that all the expenditures under the control of the Board of Regents be audited.

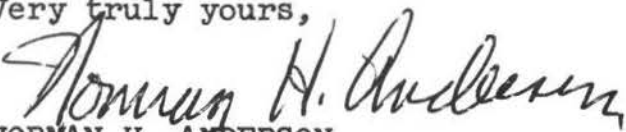
We are attaching an official opinion No. 41, issued to the Honorable Haskell Holman, dated May 20, 1957, holding that where an audit is made by the State Auditor of a school district and is accepted by the Board of Directors, it is sufficient to do away with the necessity of an audit as provided in Section 165.121, RSMo Supp. 1967.

CONCLUSION

It is therefore the opinion of this office that because of the provisions of Section 174.240, RSMo Supp. 1967 placing the entire administration of the Jasper County Junior College District in the hands of the Missouri Southern State College Regents, an audit by the State Auditor of Missouri Southern State College should include an audit of all expenditures by the Board of Regents in administering the first two years of college under the Jasper County Junior College District.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Arnold Brannock.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Encl. Op. No. 41,5/20/57-Holman

WORKMEN'S COMPENSATION:
SCHOOLS:

A school district board of directors has authority to elect to become an "employer" under the Workmen's Compensation law and to provide workmen's compensation for its employees and use public funds for such purposes.

OPINION NO. 332

December 24, 1968



Honorable Donald L. Manford
State Senator - District 8
Missouri Senate
9409 Oakland
Kansas City, Missouri 64138

Dear Senator Manford:

This is in response to your request for an opinion concerning whether local school districts can expend public funds to secure Workmen's Compensation Insurance coverage for teachers, administrative personnel, and others employed by the school district.

It is our opinion that local school districts can expend public funds for this purpose.

Section 287.030, RSMo 1959, provides:

"1. The word 'employer' as used in this chapter shall be construed to mean:

* * * *

"(2) The state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school boards, board of education, regents, curators, managers or control commission, board or any other political subdivision, corporation, or quasi corporation, or cities under special charter, or under the commission form of government, which elects to accept this chapter by law or ordinance."

Section 287.090, RSMo 1959, provides:

"1. Sections 287.050 to 287.080 and 287.120 shall not apply to any of the following employments:

Honorable Donald L. Manford

"(1) Employments by the state, county, municipal corporation, township, school or road, drainage, swamp and levee districts, or school board, board of education, regents, curators, managers, or control commission, board or any other political subdivisions, corporation, or quasi-corporation thereof;

* * * *

"2. Any employer in this section exempted from the operation of sections 287.050 to 287.080 and 287.120 may bring himself within the provisions of this chapter by filing with the commission notice of his election to accept the same, or by the purchasing and accepting by the employer of a valid compensation insurance policy, and such election by the purchase and acceptance of said insurance policy shall include the exempted employments described in subdivisions (1) . . . of subsection 1 if such intent is shown by the terms of the policy. . . ."

Reading these two sections in conjunction with Section 287.800, RSMo 1959, which provides that the provisions of the Workmen's Compensation Law, ". . . shall be liberally construed with a view to the public welfare. . .", leads one to the unescapable conclusion that the legislature intended to provide local school districts with power and authority to elect to bring themselves within the provisions of the Workmen's Compensation Act.

The Supreme Court of Missouri has held that the expenditure of public funds to procure insurance by a city school district board of education under the Workmen's Compensation Act is not prohibited by the Constitution. *Hickey v. Board of Education of City of St. Louis*, 256 S.W.2d 775, 777 [7] (Mo. 1953). The court held that a school district may elect to become an employer. The court said 1.c. 776:

". . . section 287.030 and 287.090 authorize a school district to elect to become an 'employer' under the Workmen's Compensation Law, Chap. 287, §§ 287.010-287.800."

In view of our holding in this opinion, we are hereby withdrawing Opinion No. 22, issued September 7, 1966 to the Honorable Ben Morton, and Opinion No. 118, issued March 28, 1967 to the Honorable Jack Yocom.


Honorable Donald L. Manford

CONCLUSION

It is the opinion of this office that a school district board of directors has authority to elect to become an "employer" under the Workmen's Compensation law and to provide workmen's compensation for its employees and use public funds for such purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

TAXATION (COUNTY):
COUNTY AMBULANCE SERVICE:

A county can submit to the voters under Section 137.065, RSMo 1959, a proposed increase in County Revenue Tax for the establishment and maintenance of the ambulance service authorized by Section 67.300, RSMo Cum. Supp., 1967.

OPINION NO. 333

July 30, 1968

Honorable Maurice B. Graham
Prosecuting Attorney
Madison County
148 East Main Street
Fredericktown, Missouri 63645



Dear Mr. Graham:

This is in response to your request for an opinion concerning whether a county can submit to the voters under Section 137.065, RSMo 1959, a proposed increase in County Revenue Tax for the establishment and maintenance of the ambulance service authorized by Section 67.300, RSMo Cum. Supp., 1967.

The applicable tax provisions are as follows:

Article X, §1, Missouri Constitution reads as follows:

§ 1 "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes." (emphasis added)

Section 137.035 reads as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the constitution and laws of this state, viz: * * *
* * * * *the taxes for current expenditures for counties, townships, municipalities, road districts and school districts, including taxes which may be levied for library, hospitals, public health, recreation grounds, and museum purposes, as authorized by law."

Honorable Maurice B. Graham

Section 137.065 reads as follows:

1. "For county purposes the annual tax on property, not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof, shall not exceed the rates herein specified; In counties having three hundred million dollars or more assessed valuation the rates shall not exceed thirty-five cents on the hundred dollars assessed valuation; and in counties having less than three hundred million dollars assessed valuation the rate shall not exceed fifty cents; provided, that in any county the maximum rates of taxation as herein limited may be increased for not to exceed four years, when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors of the county voting thereon shall vote therefor.
2. "County courts are hereby authorized to call and conduct a special election under the laws governing such election for the purpose of increasing maximum tax rates herein specified, or to submit a proposition for the increase of such rates at any regular election, and shall submit any such proposition at either a special or regular election when petitioned therefor by not less than ten per cent of the qualified voters of the county as determined by the total vote cast for governor in the last preceding general election for governor, and the proposition shall be as follows on the ballot: 'For a levy for county purposes on the hundred dollars valuation' and 'Against a levy for county purposes of on the hundred dollars valuation.'
3. "Special elections called under the provisions of this section shall be limited to one election for each twelve month period.
4. "The county court shall publish a notice of said election in some newspaper published in said county in the following manner:

Honorable Maurice B. Graham

If a daily paper, for seven successive days, and if a weekly newspaper, in two issues thereof, and the election shall be held not less than five, nor more than ten days, from the last insertion thereof; provided, that in all counties having a board of election commissioners such election when called by the county court shall be conducted by the board of election commissioners as provided by law." (R.S. 1939, § 11046, A.L. 1943 p. 1008, A.L. 1945 p. 1778, A.L. 1947 V. I p. 539, A.L. 1947 V. II p. 422)

The above quoted provisions indicate that the county court may call and conduct an election for the purpose of increasing maximum tax rates so long as the tax is for "county purposes".

Section 67.300, RSMo Cum. Supp., 1967 provides as follows:

"Any county, city, town or village may provide a general ambulance service for the purpose of transporting sick or injured persons to a hospital, clinic, sanatorium or other place for treatment of the illness or injury, and for that purpose may

(1) Acquire by gift or purchase one or more motor vehicles suitable for such purpose and may supply and equip the same with such materials and facilities as are necessary for emergency treatment, and may operate, maintain, repair and replace such vehicles, supplies and equipment;

(2) Contract with one or more individuals, municipalities, counties, associations or other organizations for the operation, maintenance and repair of such vehicles and for the furnishing of emergency treatment;

(3) Employ any combination of the methods authorized in subdivision (1) and (2) of this section.

2. The municipality or county shall formulate rules and regulations for the use of the equipment and may fix a schedule of

Honorable Maurice B. Graham

fees or charges to be paid by persons requesting the use of the facilities and provide for the collection thereof.

3. The municipality or county may purchase insurance indemnifying against liability of the county or city and the driver and attendants of the ambulance for the negligent operation of the ambulance or other equipment or supplies or in rendering services incidental to the furnishing of the ambulance service."

The emergency clause which was attached to Section 67.300 at the time it was adopted by the legislature amplifies the public concern and county purpose involved in this statute.

"Because of the serious need for general ambulance service in many areas of the state, and because the lack of this service could result in permanent injury or death to many citizens of Missouri, this act is deemed necessary for the immediate preservation of the public health, welfare, peace, and safety, and is hereby declared to be an emergency act within the meaning of the constitution and this act shall be in full force and effect upon its passage and approval." Emergency Clause to H.B. 213
74th General Assembly (Emphasis added)

Although there are no Missouri decisions which undertake to define what is meant by "county purposes", other jurisdictions have considered this problem and reached conclusions which support the idea that a county ambulance service is a "county purpose" within the taxing statutes.

In Johnson v. Donham (Ark. 1935), 84 S.W. 2d 374, 375, the Arkansas Supreme Court said:

"The 'county purposes' for which the county's money may be disbursed are those purposes which promote the welfare of the county as a whole and of its citizens -- such as, the erection of county buildings, bridges over county roads, and such other purposes as would promote the general health and welfare of its citizens...."

Honorable Maurice B. Graham

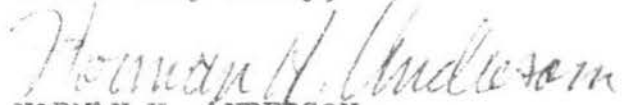
The Tennessee Supreme Court in Carter v. Beeler, (Tenn. 1949), 219 S.W. 2d 195 held that a private act authorizing a county to issue bonds to acquire a site for a hospital and to erect a hospital thereon was authorized under a constitutional provision that the General Assembly shall have power to authorize counties to impose taxes for "county purposes".

CONCLUSION

Therefore, it is the opinion of this office that a county can submit to the voters under Section 137.065, RSMo 1959, a proposed increase in County Revenue Tax for the establishment and maintenance of the ambulance service authorized by Section 67.-300, RSMo Cum. Supp., 1967.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Dorr.

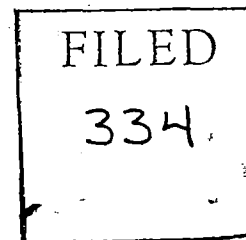
Yours very truly,


NORMAN H. ANDERSON
Attorney General

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August 20, 1968

OPINION NO. 334
Answered by letter-McFadden



Honorable James S. Corcoran
Circuit Attorney, City of St. Louis
Municipal Courts Building
St. Louis, Missouri 63103

Dear Mr. Corcoran:

This is in response to your request for an opinion on the imposition of multiple sentences so that they may run concurrently.

Two statutes play an important role in the area of consecutive sentences. The first governs the sentencing of a convict for a crime committed after he was originally sentenced for another crime. RSMo 222.020 (1959) states:

" . . . and if any convict commits any crime in an institution of the department of corrections, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in the county shall have jurisdiction of the offense, and the convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of the convict shall not commence to run until the expiration of the sentence under which he is held. * * * "
(Emphasis added.)

This statute directs that service of a second sentence to the custody of the Department of Corrections cannot commence until expiration of a prior sentence thereto, if the second crime is committed at a time when the accused is already under sentence for another crime. The Missouri Supreme Court in State v. Campbell, 307 S.W.2d 486, 490 [3], recognized that it is the commission of

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the second offense with relation to the time of sentencing for the first offense which is controlling. If the second offense is committed after the accused has been sentenced for the first offense, then the statute dictates that the term of imprisonment for the second offense shall not commence to run until the expiration of the term of imprisonment for the first offense. (Attached is a prior opinion of this office, No. 65 dated 23 March 1964 on this subject.)

The other statute is RSMo 546.480. Section 546.480, RSMo 1959 states:

"When any person shall be convicted of two or more offenses, before sentence shall have been pronounced upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction."

It was recognized in State v. McClanahan, 418 S.W.2d 71 (1967), that Section 546.480 governs the imposition of sentences on any person convicted of two or more offenses before being sentenced on either and its provisions were found to be mandatory.

The recent case of King v. Swenson, 423 S.W.2d 699 (1968), elaborates further on both of the above statutes, particularly Section 546.480. To fully understand this decision, it is best to set out the fact situation which confronted the court.

"The essential chronology of King's criminal history then is that he was sentenced to a term of fifteen years imprisonment on November 17, 1955, and since then has been confined in the penitentiary. On October 9, 1962, he was found guilty by a jury's verdict of attempted escape and on January 16, 1963, of offering violence to a guard. On February 7, 1963, he was sentenced to a term of five years for offering violence and on February 20, 1963, to a term of four years for attempted escape. His fifteen-year term for first degree robbery was terminated October 28, 1965, by the governor's commutation. * * * " Supra at 704.

King contended that the four and five-year sentences ran concurrently with the 15-year term as commuted, thereby entitling him to be discharged. The Missouri Supreme Court disagreed and held that the sentences ran consecutively because of Section 546.480, RSMo 1959 and Section 222.020, RSMo 1959.

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After upholding the statutes, Sections 222.020 and 546.480, against any constitutional attack, the court stated that:

" * * * The Habitual Criminal Act authorizes the judge to impose such punishment as is 'provided by law'. Sections 222.020 and 546.480 are a part of the law provided and are binding on the judge. He is authorized to determine the length of the term within the limits provided by law, but he cannot provide concurrent sentences when §§ 222.020 and 546.480 are applicable. * * * " Supra at 708[18,19].

The court noted that:

" * * * Section 546.480 applies only when the person has been convicted of two or more offenses before he is sentenced for either offense. * * * " (Emphasis on original.)
Supra at 708[20].

To have avoided this result the sentencing for the first conviction by the first court would have had to occur prior to the conviction for the second offense. In such a situation the second sentence could be concurrent with the previous one. Otherwise, it appears that a court cannot impose concurrent sentences whenever a person is convicted of two or more offenses. The court in King made it clear that:

" * * * Section 546.480 makes mandatory that which the courts had authority to do but sometimes omitted or left in doubt. The need of such legislative provision is even more appropriate where the sentences are imposed by different courts and the court imposing the later sentence may not know or be fully informed as to the previous sentence with the result that without the statute the later sentence might be construed as concurrent and in effect impose no punishment for the additional offense. * * * " Supra at 709.

Thus, if a trial court desires to make multiple sentences run concurrently, the procedure to be followed is for the court to receive the conviction for each offense separately and for the court to impose sentence for each offense separately and before sentences are imposed for other offenses.

An exception to Section 546.480 is RSMo 560.110(2). It requires a sentencing court to so order if sentences for burglary and stealing resulting from the same trial are to be consecutive. If no order is made, the statute directs that such sentences be concurrent.

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In order for a sentencing court to impose concurrent sentences on multiple convictions each sentence must be imposed before another conviction is received. Otherwise, when more than one conviction is received before sentence is imposed, Section 546.480, RSMo 1959, requires that the sentences be served consecutively.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure: Op. No. 65
3/23/64 - Burrell

PRIMARY ELECTIONS:
FILING FOR ELECTIONS:
DEATH OF INCUMBENT:

If a candidate for nomination to an office of which he is an incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election

within the provisions of Subsection 1 of Section 120.545, RSMo Cum. Supp., 1967: (1) The five day reopened period for filing provided for in Section 120.545 commences immediately, the first day being the day immediately following the death, withdrawal or disqualification of the incumbent; (2) There are no requirements for notice to be given with regard to the opening of the five day reopened filing period provided for in Section 120.545; (3) The five day reopened filing period shall run on consecutive days unless the last day happens to be a Sunday in which case Sunday shall be excluded and the last day shall be Monday.

OPINION NO. 335

July 30, 1968

Honorable James C. Kirkpatrick
Secretary of State of Missouri
Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This is in response to your request for an opinion which was stated as follows:

"Recently a Representative in the Missouri Legislature, from St. Louis, withdrew as a Candidate. The following questions have arisen:

1. When does the reopening of the filing period begin?
2. Upon whom does the duty fall for giving notice of the opening of the 5-day filing and in what form?
3. Does the 5-day reopening period include Saturday and Sunday or only those days when the Office of Secretary of State is normally open for business?"

The applicable statute is Section 120.545, RSMo Cum. Supp., 1967 which provides as follows:

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"Except as provided in subsection 2, if a candidate for nomination to an office of which he is the incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election, filing for the office shall be reopened for a period of five days following the death, withdrawal or disqualification during which period new candidates may enter and file their declarations of candidacy.

"If a candidate for nomination to an office of which he is the incumbent dies, withdraws or becomes disqualified following the sixteenth day next preceding the date of the primary election the election and canvass shall proceed and if a sufficient number of ballots are marked as being voted for the deceased to entitle him to nomination had he lived until after the election a vacancy exists on the general election ballot which shall be filed in the manner provided in section 120.550.

"This section shall not apply if the incumbent was the sole party candidate for nomination to the particular office."

Computation of time periods such as the five (5) day filing period provided for in Section 120.545 must be made in accordance with Section 1.040, RSMo 1959:

"The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday it shall be excluded."

1. Your first question concerns when the reopened filing period begins.

Enclosed is Op. Atty. Gen. No. 194, Hearnest, 5/13/64, which rules that the filing period provided for in Section 120.545 is reopened commencing immediately. In light of Section 1.040 this means that the first day of the five day period would be the day immediately following the day of the incumbent's death, withdrawal or disqualification.

2. Your second question concerns requisite duties to give notice of the filing period.

There are no provisions in Section 120.545 requiring any notice to be given with regard to the five day filing period. In light

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of the fact that the period for filing begins immediately upon the incumbent's death, withdrawal, or disqualification, it is apparent that the legislature did not intend for there to be notice given with regard to the reopened period.

3. Your third question concerns the scope of the five day period.

There are no exceptions made for certain days of the week in the five day filing period provided for in Section 120.545.

The only other applicable statute is 1.040 which provides that if the last day of the time limit falls on Sunday, it shall be excluded. Therefore the five day period shall run on consecutive days except for the factual situation in which the last day of the period falls on Sunday.

Section 120.340, RSMo Cum. Supp., 1967 contains the requirements of the declaration of candidacy which must be filed by a candidate under Section 120.545. Section 120.340 gives the candidate until five p.m. on the last day of the filing period to file his declaration.

Therefore since the legislature has indicated that Section 120.-340 is applicable to the reopened filing period and Section 120.-345, RSMo Cum. Supp., 1967, requires that candidates for state representative file in person, it follows that the Secretary of State must be available to receive the candidate's declaration of candidacy until five p.m. of the last day of the five day period. This would apply equally as well to a Saturday if it was the last day of the period.

CONCLUSION

Therefore it is the opinion of this office that if a candidate for nomination to an office of which he is an incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election within the provisions of Subsection 1 of Section 120.545, RSMo Cum. Supp., 1967:

1. The five day reopened period for filing provided for in Section 120.545 commences immediately, the first day being the day immediately following the death, withdrawal or disqualification of the incumbent.

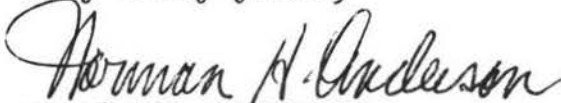
2. There are no requirements for notice to be given with regard to the opening of the five day reopened filing period provided for in Section 120.545.

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3. The five day reopened filing period shall run on consecutive days unless the last day happens to be a Sunday in which case Sunday shall be excluded and the last day shall be Monday.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard E. Dorr.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enclosure: Op. Atty. Gen. No. 194-
Hearnes-5/13/64

JACKSON COUNTY SPORTS
AUTHORITY:
TERM OF OFFICE:

The term of Karl Rogers as a commissioner of the Jackson County Sports Complex Authority, expired July 15, 1968; a vacancy exists in such office which should be filled under the provisions of Section 64.930(4) RSMo Supp., 1967; he will continue to serve in such office until his successor has been appointed and qualified.

OPINION NO. 336 (1968)

August 1, 1968



Honorable William D. Cosgrove
Assistant County Counselor
Suite 202 Jackson County Courthouse
Kansas City, Missouri 64106

Dear Mr. Cosgrove:

This office is in receipt of your request for a legal opinion reading as follows:

"On behalf of the County Court of Jackson County, Missouri, we hereby request an opinion as to the expiration date of Mr. Karl Rogers as a member of the Jackson County Sports Authority. There is an uncertainty as to whether his date of appointment is calculated from

- (1) Date of appointment by the Governor
- (2) Date of taking the oath of office
- (3) Date of confirmation by the Senate

The County Court must submit a panel of three persons to the Governor for his selection of a successor upon the expiration of Mr. Rogers' term, it is therefore necessary that we have your official opinion on this subject in order to correctly calculate the expiration of the term."

The Jackson County Sports Complex Authority was created by Section 64.920, RSMo Supp., 1967, which reads as follows:

"There is hereby created in counties of the first class not having a charter form of government a special authority to be known as the 'Jackson County Sports Complex Authority' hereinafter referred to as the 'authority,' which shall be a body corporate and politic and a political subdivision of the State of Missouri."

Section 64.930, RSMo Cum Supp., 1967, gives details concerning the organization of the Sports Authority and reads in part as follows:

"1. The authority shall consist of five commissioners who shall be qualified voters of the state of Missouri, and residents of such county. The judges of the county court by a majority vote thereof shall submit a panel of nine names to the Governor who shall select with the advice and consent of the senate five commissioners from such panel, no more than three of which shall be of any one political party, who shall constitute the members of such authority; provided, however, that no elective or appointed official of any political subdivision of the state of Missouri shall be a member of said authority.

* * * * *

"3. Such commissioners shall serve in the following manner: one for two years, one for three years, one for four years, one for five years, and one for six years. Successors shall hold office for terms of five years, or for the unexpired terms of their predecessors. Each commissioner shall hold office until his successor has been appointed and qualified."

The inquiry of the opinion request is concerned with the expiration date of Commissioner Rogers' term of office, but obviously this inquiry cannot be answered until it has first been determined the date upon which the term began and for how long a term for which the appointment was made. This is particularly true when it is noted that each of the five original commissioners was to serve for a different term, with no date fixed in the statute when the terms should begin and end. Successor commissioners are to be appointed for a term of five years. In the absence of any beginning date of a commissioner's term in the statute, we must of necessity look elsewhere for information from which such beginning date can be determined.

In the Case of State ex rel vs. Williams, the Supreme Court of Missouri held that when an office is created by a statute prescribing the length of the term of office with no date fixed for the beginning or ending of such term, the appointing power has the right and authority to fix the commencement and end of such term.

The court said l.c. 66:

"By the commission the term of relator expired May 13, 1909, or as soon thereafter as his successor was appointed and qualified. This leads us to the inquiry of what is meant by the terms 'appointment' and 'qualified.' The contentions of relator and respondent upon this proposition may thus be briefly stated: Relator insists that without the confirmation and acquiescence of the Senate there can be no legal appointment made by the Governor to the office of factory inspector. On the other hand, the respondent contends that when the term of factory inspector is at an end there was a vacancy, and the Governor had the right to fill it by appointment until such time as the Senate saw fit to confirm or reject the appointment.

* * * * *

"It will be observed that the act creating the office of factory inspector designates the length of the term, but does not undertake to fix the date of the beginning or ending thereof. It is important in the treatment of this question that we do not overlook that this is an appointive office, and not an elective one. This leads us to the inquiry as to when did the term of office of factory inspector begin, and when did it end?

* * * * *

" * * * When the General Assembly created the office of factory inspector, prescribing the length of the term, but failing to designate the commencement or ending of such term, and investing the Governor with the power of appointment to fill such office, that the Governor had the right to fix the commencement and ending of such term there certainly can be no dispute."

The court further said, l.c. 68:

"* * * For the purposes of appointment, there was a vacancy in this office May 13, 1909. The law does not contemplate that there is a new beginning and ending of the term by each appointment; but the term becomes fixed by the first appointment under the act."

It is believed the principles of law discussed by the court in the above cited case are applicable to the factual situation

in the present opinion request. Here, as there, we have a statute creating a public office with a specified term but without any statement in the statute as to when the term shall begin and end, as such dates have been left to the appointing power. Consequently, in exercising the power conferred upon him by Section 64.930 supra, the Governor of Missouri did appoint Mr. Karl Rogers as a member of the Board of Commissioners of the Jackson County Sports Complex Authority.

From the records of the office of the Secretary of State of Missouri, in which official commissions of various officers are recorded, it appears that the commission of Mr. Rogers is recorded. Such records show Mr. Rogers was appointed on July 15, 1966, for a two-year term beginning on that date and ending July 15, 1968. The appointment was confirmed by the Senate on April 19, 1967.

Keeping in mind the rule stated in *State ex rel vs. Williams*, supra, it is clear that the term of office for which Mr. Rogers was appointed expired July 15, 1968, and that a vacancy now exists which should be filled under provisions of Section 64.930(4) RSMo Supp., 1967, which provides as follows:

"4. In the event a vacancy exists a new panel of three names shall be submitted by majority vote of the county court to the governor for appointment. All such vacancies shall be filled within thirty days from the date thereof."

Under the provisions of Section 64.930(3) RSMo Supp., 1967, Mr. Rogers will continue to hold office until such time as his successor has been appointed and qualified.

Such Section provides in part as follows:

"* * * Each commissioner shall hold office until his successor has been appointed and qualified."

CONCLUSION

Therefore it is the opinion of this office that the term of Karl Rogers as a commissioner of the Jackson County Sports Complex Authority, expired July 15, 1968, and that a vacancy exists in such office which should be filled under the provisions of Section 64.930(4) RSMo Supp., 1967, and that he will continue to serve in such office until his successor has been appointed and qualified.

The foregoing opinion, which I hereby approve, was prepared by my assistant Paul N. Chitwood.

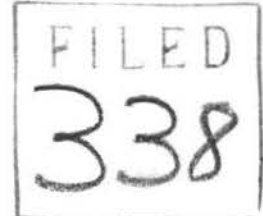
Very truly yours,

NORMAN H. ANDERSON
Attorney General

TAXATION:
CONSTITUTIONAL LAW:

The elimination of the discounts presently allowed under the sales tax act, the state income tax act, and the city earnings tax authorization statutes for the collection of such taxes would not affect the constitutionality of those statutes.

OPINION NO. 338



November 14, 1968

Honorable Maurice Schechter
State Senator - 13th District
Missouri Senate
41 Country Fair Lane
Creve Coeur, Missouri 63141

Dear Senator Schechter:

In your recent letter as Chairman of the Missouri State Tax Commission you state that the Commission is considering a recommendation disallowing the discounts presently authorized on Sales Tax Collections paid to the State of Missouri on withholding for State Income Taxes paid to the State of Missouri, on City Earnings Tax paid to the City of St. Louis and on City Earnings Tax paid to Kansas City. You have requested an informal opinion from this office as to whether the disallowance of such discounts could affect the constitutionality of any of the laws in question.

The basic question presented is whether the nominal taxpayer, who is required to collect the tax and transmit it to the State or City is entitled, as a matter of constitutional right, to compensation for the performance of the duty imposed upon him. Inherent in that question is the preliminary one of whether the state may validly impose the obligation of acting, in effect, as a collection agent for the state or city.

Missouri Appellate Courts have not as yet ruled directly on these issues. However, similar questions, in one form or another, have been presented to the Courts of a number of states as well as to the federal courts. With one exception, no longer followed, every case involving a statute which requires a retailer or employer to collect and remit taxes has sustained the constitutionality of such statute. Although

some of the statutes involved in these cases contain provisions allowing discounts or other compensation for the involuntary burden of collecting and remitting the taxes, such fact is ordinarily considered merely an additional reason rather than a necessary requisite, for the decision.

Among the relevant federal decisions are the following:

Brushaber v. Union Pacific Railroad Co., 240 U.S. 1. This case denied a number of constitutional objections to an early federal income tax statute which provided for collecting the tax at the source, that is, made it the duty of corporations to retain and pay the sum of the tax on interest due on bonds and mortgages. This was a forerunner of the present, much broader, withholding duty. The specific contention here relevant (and which was overruled without elaboration) was stated in this fashion in the opinion l.c. 21:

" * * * This duty cast upon corporations, because of the cost to which they are subjected, is asserted to be repugnant to due process of law as a taking of their property without compensation * * *."

A headnote to this case in the official report reads as follows:

"The provisions for collecting income at the source do not deny due process of law by reason of duties imposed upon corporations without compensation in connection with the payment of the tax by others."

Wilmette Park District v. Campbell, 7 Cir., 172 F.2d 885. This case involved the validity of penalties assessed against a state instrumentality for failure to collect and pay the federal tax on admissions. The Park District contended that "the duty of collecting federal taxes cannot be imposed by Congress upon elected Commissioners of a local government [sic] body and cannot make the costs of collecting the same a charge upon general tax revenues * * *." On authority of Allen v. Regents of the University System of Georgia, 304 U.S. 439, the Court sustained the assessment of penalties. The Supreme Court affirmed the ruling in 338 U.S. 411.

The Allen case, denying the objection that the application of the federal admissions tax to a state instrumentality unconstitutionally burdened a governmental function, held that the instrumentality may constitutionally be required to collect, make return of, and pay the tax to the United States. The Supreme Court said, 304 U.S., l.c. 450, that even though the burden of collecting the tax is placed directly on the state agency, "we think the tax was lawfully imposed and the respondent was obligated to collect, return and pay it to the United States."

Abney v. Campbell, 5 Cir., 206 F.2d 836, certiorari denied 346 U.S. 924, involved the validity of the withholding provisions of the Federal Insurance Contributions Act as applied to domestic employees, the contention being that domestic employers may not be burdened l.c. 838:

" * * * as uncompensated tax collectors * * *
by being required to withhold and account to
the government for portions of wages, withheld
for payment of the employees' income taxes."

In the course of the opinion, the Court states, Abney v. Campbell, Supra, l.c. 841:

" * * * withholding provisions have now become
a familiar part of our system of taxation and
can no longer be successfully challenged."

One of the contentions of the employer, that the Act imposed an involuntary servitude in violation of the Thirteenth Amendment, was denied as "frivolous." In discussing this contention, the Court said, l.c. 841:

"There is no suggestion, in the law, of the imposition of a servitude, there is merely a requirement that as to the tax due by domestic employees on account of the wages paid them by their employer, the employer must withhold the amount fixed by law and account it to the United States. The enforcement of the act is not the imposition of a servitude. It is the collection of a tax and the enforcement of an obligation which under settled federal law appellants may be and are lawfully subjected to. From our holding that the taxes and burdens imposed are valid, it must follow that the enforcement of the law imposing them is not, it cannot be, a violation of the Thirteenth Amendment."

Rainier National Park Company v. Martin, D.C. Washington 18 F. Supp. 481, affirmed without opinion 302 U.S. 661, ruled the validity of a state retail sales tax as applied to a business carried on in a national park, the state having reserved the right to tax. The law imposed a retail sales tax to be collected and transmitted to the state by the seller. In holding the law valid the Court said, l.c. 488:

"When the state reserved the right to tax, it also reserved the right to collect or enforce the tax. The former without the latter would be an empty gesture, which is not the purpose of the reservation. If the collection or enforcement incidentally constituted a regulation

of plaintiff's business, it was valid, nevertheless, if the means adopted for the collection or enforcement are reasonable. It has long been held that the imposition of the duty to collect the tax upon a person, and thus constitute such person an agent of the state, is a reasonable means for collection of the tax."

In sustaining the validity of a Kentucky statute requiring national banks as agents of their shareholders to pay the tax laid on the shares of their shareholders, the United States Supreme Court, in *National Bank v. Commonwealth*, 76 U.S. 353, commented l.c. 363:

"The mode under consideration [for collection of the tax] is the one which Congress itself has adopted in collecting its tax on dividends and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares * * *."

To the same effect are *Aberdeen Bank v. Chehalis County*, 166 U.S. 440; *Des Monies Bank v. Fairweather*, 263 U.S. 103, 111; and *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232. In *Bell's Gap Railroad Co. v. Pennsylvania* the Court stated, l.c. 239.

"The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection."

The Missouri Supreme Court has expressed a similar view of such statutes. *State ex rel Bay v. Citizens State Bank*, 274 Mo. 60, 202 S.W. 382, 385.

Pierce Oil Corporation v. Hopkins, 264 U.S. 137, is an oft-cited case. The plaintiff sought to enjoin the enforcement of an Arkansas statute requiring retailers of gasoline to collect a tax of one cent per gallon. Dealers were required to register and file monthly reports and to pay over each month the amount of the taxes accruing on the sales made. One of the constitutional objections was that l.c. 139:

" * * * the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense."

The Court ruled, l.c. 139:

"A short answer to this argument is * * * that a State which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden."

Monamotor Oil Co. v. Johnson, 292 U.S. 86, involved an Iowa statute which imposed a tax on motor vehicle fuel used or otherwise disposed of in the state. Quoting from the opinion, l.c. 93:

"Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement."

Again, l.c. 95:

"The method of imposition and collection of the tax does not deny the equal protection of the laws guaranteed by the XIV Amendment."

McGoldrick v. Berwind-White Co., 309 U.S. 33, held the New York City sales tax imposed on purchasers and which was required to be collected by the seller does not infringe the commerce clause of the United States Constitution. The companion case of McGoldrick v. Felt & Tarrant Co., 309 U.S. 70, decided on authority of McGoldrick v. Berwind-White Co., Supra, did not discuss, but necessarily denied, the following contention (as set forth in McGoldrick v. Felt & Tarrant Co., Supra, l.c. 74):

"When the City of New York compels an Illinois corporation, which is not authorized to do business in New York, to act as a collecting agency for the City, compels it to file returns, to make reports, and to incur substantial additional costs and expenses, the City is attempting to exercise its sovereign powers beyond its jurisdiction. That it cannot do without burdening commerce."

Colorado National Bank of Denver v. Bedford, 310 U.S. 41, involved a Colorado statute imposing a percentage tax on the value of services rendered by banks and requiring the banks to collect and remit the tax, less three per cent to cover the cost of the service. (This appears to be the only federal case in which the statute in question provided for compensation, at least so far as the opinions disclose.) In upholding the tax as applied to a national bank, the Court stated, l.c. 53:

"The tax being a permissible tax on customers of the bank, it is settled by our prior decisions

that the statutory provisions requiring collection and remission of the taxes do not impose an unconstitutional burden on a federal instrumentality."

To this ruling, the Court added the comment, l.c. 53:

"Especially is this true since the bank under the Colorado act is allowed three per cent of the tax for the financial burden put upon it by the obligation to collect."

Other United States Supreme Court decisions at least peripherally in point are *Felt & Tarrant Co. v. Gallaher*, 306 U.S. 62 (involving the California Use Tax Act); *Citizens National Bank v. Kentucky*, 217 U.S. 443; and *Helvering v. Davis*, 301 U.S. 619. The *Helvering v. Davis* case involved the Social Security Act, which includes a provision for withholding the employee's tax (although the validity of that provision was not in terms questioned by the distinguished counsel attacking the Act).

Another case indicative of the reasoning of the United States Supreme Court is *Leonard & Leonard v. Earle*, 279 U.S. 392, which is not however, a withholding case. There, a Maryland statute imposing a license tax on the oyster business and requiring that 10% of the empty oyster shells be turned over to the state also required that the quota of empty shells be retained by the licensee for a reasonable time until removed by the State. In holding the statute valid over the objection that, l.c. 396:

"* * * to compel storage of the shells until taking by the State would unlawfully deprive them of the use of their premises, * * *"

the Court stated (citing *Pierce Oil Corp. v. Hopkins* 264 U.S. 137), l.c. 398:

"The requirement concerning storage for a limited time of 10% of the empty shells imposes no serious burden, is but part of the general scheme for taxing the privilege, and is no heavier than demands to which taxpayers are often subjected. It is neither oppressive nor arbitrary."

As the foregoing authorities make clear, the federal courts have in every instance sustained the validity of withholding provisions of both state and federal laws. And as you are aware, the withholding tax is a major part of the federal income tax but no compensation to the employer is provided for.

As indicated above, the state courts are also in accord in holding valid, as against constitutional objections (usually due process

or involuntary servitude), requirements that a person collect and transmit to the state, without compensation, a tax imposed on another.

Among these cases are the following:

Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068. Held, provision of sales tax law requiring the seller of commodities upon which the tax is exacted from the purchaser to collect it (against his will), report the collections and to pay the amount of the tax, all without compensation (whether or not he collects the tax) is not violative of due process.

Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016. Held, the sales tax act is not objectionable because it imposes an uncompensated burden on the seller of collecting and remitting the tax. The Court stated that it was simply an administrative detail, since the consumer ultimately pays the tax, and it is within the power of the Legislature to impose such a duty as a reasonable regulation of the seller's business.

Wiseman v. Phillips, 191 Ark. 63, 84 S.W.2d 91. Held, the requirement of the sales tax act that the retailer collect and remit the tax is not an unreasonable regulation, since it does not involve the payment of any fee nor the performance of any unreasonable task.

State ex rel Rice v. Allen, 180 Miss. 659, 177 So. 763. Held, the sales tax law requiring sellers of property to collect the taxes from their customers without remuneration is valid.

State ex rel Arn v. State Tax Commission, 163 Kan. 240, 181 P.2d 532, certiorari denied 358 U.S. 907. Held, statute requiring vendors of motor fuel to collect the tax thereon without compensation does not impose an involuntary servitude.

Akers v. Handley, 238 Ind. 288, 149 N.E.2d 692. Held, withholding provisions of the Indiana Gross Income Tax Act are not violative of the Thirteenth Amendment as imposing an involuntary servitude.

Blauner's Inc. v. City of Philadelphia, 330 Pa. 342, 198 A. 889. Held, "If the imposition of the burden of tax collection without reimbursement does not violate the Fourteenth Amendment, then a fortiori, the allowance of compensation [1% for collection] constitutes an additional reason in support of the constitutionality of the sales tax ordinance.

Rinn v. Bedford, 102 Colo. 475, 84 P.2d 827. Commenting on the argument that the party rendering the service is "unlawfully constituted a collector of taxes against his will and that the compensation provided for collection [of the service tax] is inadequate and confiscatory," the Court stated that the method of collection of the tax "seems the only practical method," but in any event was a matter left to the discretion of the legislative branch of the government.

Tanner v. State, 28 Ala. App. 568, 190 So. 292, also sustained the collection and remission requirements of a sales tax act.

The only case which holds that adequate compensation must be paid a retailer for collecting and remitting a sales tax upon the consumer is In re Opinion of the Justices, 88 N.H. 500, 190 A. 801, giving this advisory opinion on a proposed sales tax law I.c. 804.

"By the bill the tax is placed upon the purchaser. Although the seller is required to guarantee, collect, account for, and pay it, he is also required to add it to the price of the article sold and may not assume or absorb or refund it. The duty thus devolved upon him to act as the collector of the tax without adequate compensation for the service a majority of us believe would be in derogation of due process as a confiscatory deprivation of his rights of equality. It would not be a service incidental to the ascertainment of his own taxes.

"The situation is not parallel with that of distributors of gasoline and other motor fuels who are required to pay the tax thereon although it is in finality a tax against the ultimate consumer. Such distributors must be licensed (Pub. Laws c.104, §1), and their duty to pay the tax is therefore a term of the license."

Parenthetically, we note that under the present Missouri sales tax act, retailers must be licensed and must pay the tax on their gross receipts as a term of the license.

In two subsequent advisory opinions, the New Hampshire Supreme Court has departed from the view expressed in 190 A. 801. In Opinion of the Justices, 95 N.H. 546, 64 A.2d 314, the Court stated:

"This provision [allowing breakage to be retained by the retailer as compensation for collecting the tax] was apparently inserted to meet the objection stated in In re Opinion of the Justices, 88 N.H. 500, 503, 190 A.801, that a retailer cannot be called upon to act as a collector of the tax without adequate compensation, * * *. With this statement we do not agree. But the above provision may be considered by the Legislature to be a proper aid in the administration of the law."
(Emphasis added.)

Then, in Opinion of the Justices, 97 N.H. 533, 81 A.2d 845, 850, the Court amplified its changed views as follows:

"In Opinion of the Justices, 95 N.H. 546, 64 A.2d 314, the view was expressed that the provision that breakage be retained by the retailer as compensation for collecting a sales tax was a proper aid in the administration of the law, but not constitutionally required. This duty of collection is similar to that of withholding taxes under the Federal Income Tax provisions. It is a public duty that need not be compensation." (Emphasis added.)

See also 16A C.J.S., Constitutional Law, §650b, pp. 978-980, and 16 C.J.S., Constitutional Law, §203(5), pp. 1002-1003.

As we have noted, your question has not been directly considered in any Missouri case (with the possible exception of the Citizens State Bank case, 202 S.W. 382, 385). There is, however, one case which considered one aspect of the question in reverse, that is, the validity of allowing a discount for collection. That case, *Ex parte Asotsky*, 319 Mo. 810, 5 S.W.2d 22, concerned a city ordinance imposing an occupation tax upon cigarette dealers. The tax was in an amount equivalent to 20% of the retail sales price of the cigarettes, to be paid by purchase of stamps to be affixed to the packages. A 10% discount in the sale of the stamps to the dealer was allowed. One of the constitutional objections urged was that since the consumer was required to pay the entire 20 per cent, the allowance to the dealers of a 10 per cent "profit" for themselves on such stamps "out of the public funds authorized to be collected from and paid to the consumer" was violative of Article X, Section 3, of the Constitution of 1875 "because the tax thereby attempted to be levied is not wholly and exclusively for public purposes." (Article X, Section 3, of the 1945 Constitution contains a similar requirement that taxes may be levied and collected only for public purposes.) The Court rejected the foregoing contention as follows:

"The ordinance is not reasonably subject to this objection. The provision for the purchase by the dealer of stamps representing 20 per cent. of the retail price at a discount of 10 per cent. is in effect a tax of 18 per cent. instead of 20 per cent. No stamps are sold at 100 per cent. of their face value to any one. There is nothing requiring the dealer to sell cigarettes at any stated price. All of the 18 per cent. tax is paid to the city and finds its way into its treasury where it is used for public purposes, as distinguished from private purposes. The requirement that stamps, representing 20 per cent. of the retail price less 10 per cent. be purchased, is nothing more or less than an unnecessarily round-about way of imposing an 18 per cent. tax on sales of cigarettes.

* * * * *

"If the ordinance required the dealer to collect 20 per cent. of the retail price from the purchaser of the cigarettes in packages and then gave the dealer 10 per cent. of the money so collected or required the purchaser of a package of cigarettes to buy from the dealer, attach to the package and cancel a stamp and to pay therefor the full face of the stamp, a different situation would arise. But since the dealer is not required to collect the tax from the purchaser and the rate he pays for the stamps is 18 per cent. of the retail price, whether the purchaser ultimately pays it or the dealer absorbs it no public money is paid to or retained by the dealer."

In citing Asotsky, we do not mean to imply that the Court would have ruled otherwise had the "different situation," adverted to by the Court, been present. It is a matter of common knowledge that the discount is seldom "profit" in view of the additional expense and burden involved. We note, however, that the present Missouri cigarette tax act, Chapter 149 RSMo., as amended (which allows a discount of 3 per cent to the wholesaler on the total amount of stamps purchased,) "as compensation for affixing the stamps and making such reports", (Section 149.030 RSMo Supp., 1967) requires the full amount of the tax to be added to the sales price, the expressed intent being to impose the tax on the consumer, "with the person first selling the cigarettes acting merely as an agent of the state for the payment and collection of the tax to the state." (Section 149.020 RSMo Supp., 1967)

The present Sales Tax Act authorizes the seller to deduct and retain an amount equal to two per cent from every remittance made on or before the date when the same becomes due. Section 144.140, RSMo Supp., 1967. Formerly, the authorized deduction was three per cent. By reason of the 1965 amendments, the tax is now levied upon sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state, and they are required to obtain a retail sales license without cost and to report and pay the tax on their gross receipts. Sections 144.020, 144.021, 144.080, 144.083, 144.100. In this respect the law is now comparable to the Motor Vehicle Fuel Tax Act, that is, the tax is directly placed on the seller, although he is required to collect it from the purchaser to the extent possible. The requirement that the tax be paid to the seller by the purchaser and the prohibition against advertising or holding out that the tax will be absorbed by the seller is a common provision adopted quite generally for the protection of small merchants.

In view of the fact the sales tax is now a gross receipts tax on the seller for the privilege of engaging in the retail business, it would appear that the primary purpose of the present two per cent

Honorable Maurice Schechter

deduction is simply to assure prompt remission of the tax (it being allowed only if the remittance is timely made). We are aware of no constitutional necessity for the allowance of a discount for prompt payment of a tax directly imposed on the taxpayer. In our opinion, the elimination of the discount would in no wise affect the validity of the sales tax act. Significantly, the Trailer Camp Tax Law, which imposes a privilege tax on the lessor but requires him to collect the tax from the lessee and remit the same to the state, contains no provision authorizing the lessor to retain any portion of the tax so collected. See to this effect Opinion No. 16, dated October 30, 1953, addressed to Hon. L. M. Chiswell.

The Compensating Use Tax Law (Sections 144.600 et seq.), although complementary to the sales tax act, places the primary obligation for the use tax on the person who stores, uses or consumes the tangible personal property, making the vendor responsible for collecting, reporting and remitting the tax. Although a privilege tax, the taxable privilege is not that of the vendor. The vendor is authorized to deduct and retain an amount equal to three per cent of the amount remitted (Section 144.710), but only for prompt remittance. The other taxes to which you refer, the State Income Tax and the City Earnings Taxes of St. Louis and Kansas City are likewise taxes which are not imposed on the person required to collect and remit the same. In each instance the employer is required to withhold the amount of the tax from the wages paid the employee taxpayer, to make reports and to pay over the tax withheld.

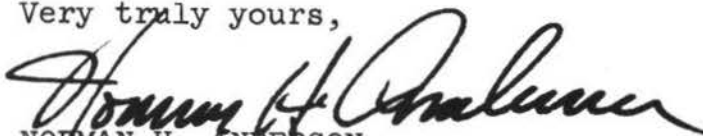
In our opinion, the state (or city as the case may be) may lawfully impose the incidental burden on the employer (or vendor, in the case of the compensating use tax) of collecting and remitting the tax without compensation for the performance of the duty, just as the federal government imposes a similar duty of withholding federal income taxes without compensation. The imposition of such an uncompensated burden does not, under the authorities cited herein, constitute either a taking of property without due process or an involuntary servitude.

CONCLUSION

The elimination of the discounts presently allowed under the sales tax act, the state income tax act, and the city earnings tax authorization statutes for the collection of such taxes would not affect the constitutionality of those statutes.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. Thomas J. Downey.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

COUNTIES:
DIVISION OF WELFARE:
FOOD STAMPS:

A county or City of St. Louis cannot participate in food stamp program until approved by federal Department of Agriculture.

OPINION NO. 341

November 14, 1968



Honorable Richard M. Webster
State Senator - 32nd District
Missouri Senate
1725 South Garrison
Carthage, Missouri

Dear Senator Webster:

This is in response to your letter of July 13, 1968, in which you enclosed a letter of July 3, 1968, which reads in part as follows:

"The Missouri State Association of Community Action Agencies is much interested in implementation of the Federal Food Stamp plan throughout Missouri.

"During the 74th general assembly, House Bills 181 and 522 and Senate Bill 238 were introduced to provide statewide consideration, but all died in committee. We have been told that such new legislation is necessary. We question whether this is the case however, in view of Section 205.960, Missouri revised statutes (Supplement 1965)."

Distribution of surplus agricultural commodities and food stamps is provided for under Section 205.960, RSMo Supp. 1967, which reads as follows:

"1. Any county or any city not within a county may establish a program for the acquisition, storage and distribution of surplus agricultural commodities or for the sale and issuance of food stamps to participating families and needy persons pursuant to acts of the congress of the United States, and may rent, lease or otherwise provide the necessary storage and distribution facilities and administrative personnel therefor. The county or city may enter into contracts or agreement with

Honorable Richard M. Webster

any other county or city not within a county for the establishment and operation of a joint program or for the joint use of facilities or services.

"2. The director of the division of welfare of the department of public health and welfare shall make and promulgate necessary and reasonable regulations for the administration of the programs established pursuant to subsection 1, and for the certification of the eligibility of recipients of the commodities. The division of welfare shall be the certifying agency responsible for certifying households as eligible for the issuance of food stamps, if required by federal law or regulation.

"3. The division of welfare of the department of public health and welfare shall, on or about the fifteenth day of each month, reimburse any county or city not within a county in an amount equal to fifty per cent of the sum expended by the county or city for the acquisition, warehousing and necessary cold storage, safekeeping, maintenance of proper records, issuance of food stamps and distribution of surplus agricultural commodities during the preceding month; provided the expenditures have been approved by the division of welfare."

Under Section 205.960, supra, any county or city not within a county may establish a program for the distribution of surplus agricultural commodities or for the sale or issuance of food stamps pursuant to the acts of Congress. It must comply with the acts of Congress and the rules and regulations issued by the federal authorities.

The act of Congress establishing the food stamp program is found in Chapter 51, Section 2011 to and including Section 2025, 7 USCA. Section 2013 provides for the Secretary of Agriculture to issue such rules and regulations as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

Pursuant to the above statutes, the Secretary of Agriculture issued Rule and Regulation No. 1600.2, Title 7, Code of Federal Regulations which provides in part:

" 'Eligible household' means a household that lives in a project area and whose income and resources are determined to be a substantial limiting factor in the attainment of a nutritionally adequate low-cost diet.

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Honorable Richard M. Webster

" 'Project area' means the political subdivision within a State which has been approved for participation in the Program by the Department."

Under the above statutes and regulations, before a county or a city not within a county can participate in the food stamp program, it must be approved for participation by the Department of Agriculture. When it is approved then under Section 205.960, supra, the State Division of Welfare has authority to make the necessary rules and regulations for the administration of the program for issuing food stamps as required by federal law and regulation and in performing the necessary duties placed upon the Division of Welfare under said statute.

CONCLUSION

It is the opinion of this office that the State Division of Welfare is not required to comply with the provisions of Section 205.960, RSMo Supp. 1967, which provides that the Division shall certify households as eligible for food stamps and reimburse the county or city not within the county fifty per cent of the sum expended by the county or city for issuance of food stamps, until the county or city not within a county has been approved for participation in the federal food stamp program by the federal Department of Agriculture.

The foregoing opinion, which I hereby approved, was prepared by my Assistant, Moody Mansur.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

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OPINION NO. 344
Answered by Letter--Gardner

September 3, 1968

Honorable Joe D. Holt
State Representative
102nd District
829 Center Avenue
Fulton, Missouri 65251

Dear Representative Holt:

This is in response to your request for an opinion on the question whether the City Council of the City of Fulton may designate the existing "Park Board" as the "Park and Recreation Board" and delegate thereto administrative powers and responsibilities for the operation of a system of public recreation in the city park.

While the Legislature has directed that the taxes levied, collected and specified in Section 90.500, RSMo Cum. Supp. 1967, shall be known as the "park fund", there are no statutory provisions requiring the directors appointed under Section 90.520, RSMo 1959, be known as the "park board". Therefore, the city council by ordinance may provide that the existing park board may be known as the "park and recreation board" if the council chooses to do so.

Authority to empower the board to administer a recreation program is derived from Section 64.765, RSMo Cum. Supp. 1967, the first sentence of which is as follows:

"The governing bodies establishing a system of public recreation may conduct the same through any existing board or body or may establish a separate recreational board or commission, or park and recreational board or commission, and delegate thereto all administrative powers and responsibilities of the governing body under sections 64.750 to 64.780. * * * "

Honorable Joe D. Holt

It is clear that the administrative powers and responsibilities of the city council under Section 64.750 to Section 64.780 may be delegated to the existing park board or to a separate recreational board or commission established for that purpose.

Your last question concerning funds for recreational purposes was considered in our Opinion No. 102, issued June 26, 1962, to the Honorable Chester W. Hughes, State Representative from Johnson County. A copy of that opinion is enclosed. Please note, however, that since that opinion was issued, Section 90.500 has been amended to increase the maximum rate of taxation from two mills on each one dollar to 40 cents per year on each one hundred dollars assessed valuation. In all other respects, the conclusion reached with respect to the City of Warrensburg would be applicable to the City of Fulton.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

LJG/jlf
Enc.--Op. No. 102; 6/29/62; Hughes

SCHOOLS:
IMPEACHMENT:
RECALL:
QUO WARRANTO:

1. The fact that two directors on the board of a common school district do not send their children to the public schools within the district and are seeking annexation of their district into another district is not sufficient grounds under Section 162.801 RSMo Cum. Supp., 1967, to declare vacancies on the board and consequently the County Superintendent of Schools has no authority to appoint new directors.

2. Members of the Board of Directors of a common school district do not violate any of their statutory duties as enumerated in Section 162.091 RSMo Cum. Supp., 1967, because of their refusal to send their children to the public school within their district or because of their activity favoring annexation of their district into another district.

3. There are no provisions for the recall or impeachment of members of the board of directors of a common school district. Board members may be removed from office by a quo warranto proceeding.

OPINION NO. 347

September 12, 1968

Honorable Zane White
Prosecuting Attorney
Phelps County Court House
Rolla, Missouri 65401



Dear Mr. White:

This is in response to your request for an opinion which was stated as follows:

"The County Superintendent of Schools, J. Leonard Bell, respectfully requests an Attorney General Opinion concerning the Flat Grove School District Number 21, which is a common school district having three members on the Board of Directors. Two members of the Board are actively seeking to have the Flat Grove School District dissolved and annexed into the Rolla School District. They also refuse to send their own children to the Flat Grove School and one sends his children to Luthern Parochial Schools while the other one sends his children to the Rolla School District paying tuition. Because of the adverse and antagonistic attitude and behavior of these two school directors to the school on a Board of which they serve, a

petition calling for the resignation of one has been signed by 74 resident voters of the school district which is more than half of the number of votes cast in the election of said district. Neither of these directors will resign from office.

"Question 1. Can these two directors positions on the Board be declared vacant and filled by the County Superintendent of Schools under Section 165.217?

"Question 2. Are such school directors in violation of 165.160 of the Revised Statutes of Missouri?

"Question 3. May these school directors be impeached, recalled, or otherwise ousted from office?"

This opinion will consider the questions in the same order as in your request.

Section 165.217, RSMo 1959, which is the subject of your first question has been repealed and reenacted and is now found in Section 162.801 RSMo Cum. Supp., 1967, in substantially the same form. Section 162.801 provides as follows:

"If a vacancy occurs in the office of director by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill the vacancy; but if they are unable to agree or if there is more than one vacancy at any one time the county superintendent of public schools shall, upon notice of the vacancies being filed with him in writing, immediately fill the same by appointment, and notify the persons in writing of their appointment; and the persons appointed under this section shall comply with the requirements of section 162.781, and shall serve until the next annual school meeting."

In order for the county superintendent of schools to have authority to appoint a new director, there must be written notice filed with him stating the existence of a vacancy within the meaning of Section 162.801. Under the facts as stated in the request it does not appear that the directors in question have refused to serve or repeatedly neglected their duties so as to create the requisite vacancy.

Honorable Zane White

Section 165.160 RSMo 1959, which is the subject of your second question has been repealed and reenacted and is now Section 162.091 RSMo Cum. Supp., 1967, and provides as follows:

"Any county clerk, county superintendent, county treasurer, school board member, officer or employee, or other officer, who willfully neglects or refuses to perform any duty imposed upon him by chapters 160 to 168, 170, 171 and 177 to 179, RSMo, or who willfully violates any provision of these chapters, is guilty of a misdemeanor and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail not to exceed one year."

There are no provisions within any of the duties enumerated in Chapters 160 to 168, 170, 171, and 177 to 179 RSMo which require that a director of a common school district (a) send his children to the public school in the district which he represents, or (b) refrain from seeking annexation of the district which he represents. In absence of a violation of his statutory duties a school board member may not be punished under Section 162.091.

There are no provisions in the Missouri Constitution or statutes for recall of school board members.

Impeachment of public officers is provided for in Article VII of the Constitution of Missouri and Chapter 106 RSMo. No provision is found for impeachment of school board directors.

A means by which board members of a common school district can be ousted from office, is a quo warranto action brought under Section 531.010, RSMo 1959. This has previously been established by the Missouri Supreme Court in its decisions that quo warranto is a proper remedy to oust any person whose title to office has been forfeited by misconduct or other cause. State v. Ellis (Mo. 1931), 44 S.W.2d 129; State v. Heath (Mo. 1939), 132 S.W.2d 1001. Of course ouster will be granted by a court in a quo warranto proceeding only when facts are established sufficient to show that title to office has been forfeited.

CONCLUSION

Therefore it is the opinion of this office that:

1. The fact that two directors on the board of a common school district do not send their children to the public schools within the district and are seeking annexation of their district into another district is not sufficient grounds under Section 162.801 RSMo Cum. Supp., 1967, to declare vacancies on the board and consequently the County Superintendent of Schools has no authority to appoint new directors.

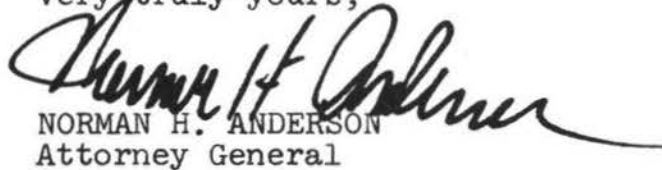
Honorable Zane White

2. Members of the Board of Directors of a common school district do not violate any of their statutory duties as enumerated in Section 162.091 RSMo Cum. Supp., 1967, because of their refusal to send their children to the public school within their district or because of their activity favoring annexation of their district into another district.

3. There are no provisions for the recall or impeachment of members of the board of directors of a common school district. Board members may be removed from office by a quo warranto proceeding.

The foregoing opinion which I hereby approve was prepared by my assistant, Thomas J. Downey.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

ELECTIONS:
CANDIDATES:
COUNTY TREASURER:

Section 54.040, RSMo. 1959, does not prohibit a deputy county clerk of a second class county from being eligible to the office of treasurer of said county when such individual has resigned

as deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

OPINION NO. 350

September 5, 1968

Honorable Robert P. Warden
Prosecuting Attorney
Jasper County Court House
Joplin, Missouri 64801



Dear Mr. Warden:

This is in response to your opinion request in which you asked whether a person who holds a position of a deputy county clerk of a second class county is eligible to the office of treasurer of said county when such person resigns from the office of deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

Your question requires an interpretation of Section 54.040, RSMo. 1959, which states in full as follows:

"No sheriff, marshall, clerk or collector, or the deputy of any such officer, shall be eligible to the office of treasurer of any county."

The general provisions relative to the office of county clerk are stated in Chapter 51, RSMo. 1959. Section 51.440, RSMo. 1959, provides for the appointment and compensation of deputies of class two counties.

In turning to the application of the provisions of Section 54.040 to the question involving the eligibility of the deputy county clerk who has vacated the office prior to the primary election, we note that the Missouri Supreme Court has thus far rendered two decisions interpreting that section.

In State v. Dunn, 209 S. W. 110 (1919), the Supreme Court of Missouri considered the meaning of the word "eligible" in connection with a deputy collector of the City of St. Louis who resigned his office after the election and before taking the office of treasurer. It was the holding of the court that the definition of "eligible" depended upon the context and on the subject, and in that particular instance the court stated that the legislature intended that a collector was incapable of being chosen treasurer. The court continued

and found a general incompatibility between the two offices and held that the deputy collector was on the same footing as his chief. Accordingly, they awarded the writ of ouster. The concurring opinion found that the term "eligible" when used in the statutes or the constitution without contextual qualification or modificatory terms, refers to the legal capacity to hold an office at the time of election or appointment thereto of the person designated. The concurring opinion also found that the right and title to an office is determined by a valid election or appointment thereto and hence the qualification of the person chosen or appointed must exist at the time of the accrual of his right and title.

In a later case, State v. Moore, 152 S. W. 2d 86 (1941), the Supreme Court considered the section under question and whether a township collector was included within the prohibition of the statute making a collector ineligible to the office of county treasurer. The court distinguished the township form of government and concluded that the statute referred to a county collector only and not to a township collector. While there is other dictum in the case that would give rise to some speculation as to its possible application to the instant problem, we consider it only dictum that is not substantially related to the question in this opinion, or for that matter to that case which was under consideration.

As stated in Ballentine's Law Dictionary Second Edition (1948) at page 427, generally "eligible" does not mean eligible to be elected to the office at the date of the appointment or the election, but capable of holding the office at the commencement of the term. The person elected or appointed to an office may not have the legal capacity or fitness for the office at the time of his election or appointment, and yet he may become qualified before the term begins.

However, the meaning of the word "eligible" must be determined by the context as stated in Dunn.

Further, the Moore case stated that we should observe that the statutes prescribing requirements of eligibility to an elective office must be given a liberal construction. This is so because in our democratic form of government the greatest possible freedom of choice in the selection of their officers is a natural right of the people, and this right must be zealously guarded by the courts.

We understand that the deputy county clerk resigned from his office as deputy prior to the primary election. We consider State v. Dunn, supra, as authority, and the context of that case indicates that the question of eligibility is determined at the time the party is chosen treasurer. In view of this construction given by Dunn, and in light of the liberal construction concept of Moore, we hold that the deputy county clerk, under the circumstances presented, is eligible to the office of county treasurer, having vacated the office of deputy county clerk prior to the primary election.


Honorable Robert P. Warden -

CONCLUSION

It is the opinion of this office that Section 54.040, RSMo. 1959, does not prohibit a deputy county clerk of a second class county from being eligible to the office of treasurer of said county when such individual has resigned as deputy county clerk prior to the primary election at which candidates were nominated for the office of treasurer.

This opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

JCK:ss

COUNTY COURTS:
ROADS AND BRIDGES:

County court cannot issue tax bills
against adjacent property for road
improvements

OPINION NO. 352

October 29, 1968



Honorable Zane White
Prosecuting Attorney
Phelps County
Court House
Rolla, Missouri 65401

Dear Mr. White:

On July 19, 1968, you submitted the following opinion request to this office:

"The County Court of Phelps County, Missouri respectfully requests certain information concerning the authority of a County Court to issue tax bills or to create tax liens on real estate of property owners adjacent to public roads where the county makes improvements such as black topping the surface of the road. Phelps County is a third class county.

"1. Does the County Court have express authority to create tax liens and issue tax bills for such road improvements?

"2. If the County Court does not have such authority, can the County Court acquire such authority by agreement with the adjacent property owners?

"What other method, if any, might be used in creating such liens or issuing tax bills?"

County courts have only such authority and powers as are expressly given them by statute and only such implied authority or powers as is necessary for the court to exercise the powers expressly given; and if there is reasonable doubt of the existence of such authority, it must be held that the court does not have such authority. Lancaster v. County of Atchison, 180 S.W.2d 706.

Honorable Zane White

We are unable to find any statute authorizing the county court in a third class county to create tax liens on real estate adjacent to public roads for the cost of improvement of the public road. In the absence of such a statute, it is our opinion that the county court does not have such authority.

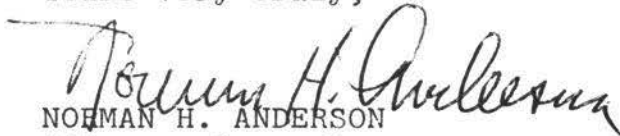
Likewise, we find no statute authorizing the county court in a third class county to enter into any binding agreement with adjacent property owners which would create tax liens or for the issuance of tax bills for the cost of improvements of such public road. In the absence of such a statute, it is our opinion that the county court does not have such authority.

CONCLUSION

It is the opinion of this office that a county court in a third class county has no authority to create tax liens and issue tax bills against adjacent real estate for the cost of improvements of the public roads and that it does not have authority to do so by entering into any agreement with the abutting property owners.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,

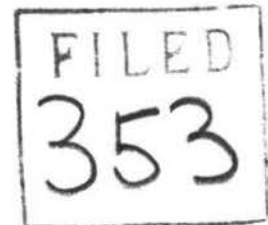

NORMAN H. ANDERSON
Attorney General

PUBLIC RECORDS:
RECORDER OF DEEDS:
MICROPHOTOGRAPHING AND
MICROFILMING OF RECORDS:
DUPLICATES: WHEN FILED:

It is the opinion of this office that when a recorder of deeds records all legally recordable documents by making and filing photostatic or photographic copies of said documents as provided by Section 109.120(3), RSMo. Cum. Supp. 1967, one copy of each original document shall be made. When the recorder records documents by making and filing microphotographic or microfilm copies, duplicate copies must be made.

OPINION NO. 353-1968

September 19, 1968



Honorable Thomas D. Graham
State Representative
District No. 122
312 East Capital Avenue
Jefferson City, Missouri 65101

Dear Representative Graham:

This office is in receipt of your request for a legal opinion, which reads in part as follows:

"I request an opinion with respect to Section 109.120, RSMo. as appears in the 1967 Supplement. Paragraph 3 of said statute authorizes a recorder of deeds to record certain instruments by photostatic, photographic, microfilm or similar mechanical process.

* * *

"I would like to know whether the 'similar reproduction' referred to in the statute applies to all methods listed therein, so that duplicate reproduction must be made as well of all photostats, photographs, microphotographs, etc. as of microfilm."

Section 109.120(3), RSMo. Cum. Supp. 1967, referred to in the opinion request reads in part as follows:

"3. When any recorder of deeds in this state is required or authorized by law to record, copy, file, recopy, replace or index any document, plat, map or written instrument, he may do so by photostatic,

Honorable Thomas D. Graham

photographic, microphotographic, microfilm or similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent records of the original. When microfilm or a similar reproduction is used as a permanent record by recorder of deeds, duplicate reproductions of all recorded documents, indexes and files required by law to be kept by him shall be made and one copy of each document shall be stored in a fireproof vault and the other copy shall be readily available in his office together with suitable equipment for viewing the filmed record by projection to a size not smaller than the original and for reproducing copies of the recorded or filmed documents for any person entitled thereto * * * "

The above quoted section authorizes the recorder of deeds to use any one of the methods therein named, as he may choose for recording all documents legally recordable by him.

The inquiry has not been made, nor shall we attempt to state all those methods which might be employed by him in recording, not specifically mentioned but would be included within the meaning of the term "or a similar reproduction". We shall have more to say about this matter later in our discussion.

In an opinion of this office written for Honorable Harry C. Raiffie, State Representative, 82nd District, 4151 Delmar Boulevard, St. Louis, Missouri, on August 22, 1967, it was concluded that the recorder of deeds has the authority and duty to determine whether instruments entitled to be recorded in his office are to be recorded by making photographic copies of such instruments which shall be bound, paged and indexed in record books pursuant to Section 59.410, RSMo. 1959, or whether such instruments are to be recorded by means of microfilm or other mechanical process pursuant to Section 109.120, RSMo. Cum. Supp. 1965. A copy of said opinion is enclosed.

In view of the conclusion reached in the enclosed opinion, when a recorder of deeds determines to record all legally recordable documents in his office by use of photostating or photographing such documents, the reproduction thus taken by him for permanent records shall be placed in bound, paged and indexed books. Neither Section 59.410, RSMo. 1959, or Section 109.120, RSMo. Cum. Supp. 1965 referred to in the opinion request provides the recorder must make duplicate photostatic or photographic reproductions.

Honorable Thomas D. Graham

It will be recalled that Section 109.120(3) supra makes special reference to microfilm and similar reproductions, which portion of the section we wish to emphasize by re quoting:

" * * * When microfilm or a similar reproduction is used as a permanent record by the recorder of deeds, duplicate reproductions of all recorded documents, indexes and files required by law to be kept by him shall be made * * * "

When the recorder uses microfilm to record documents, there is no doubt as to what his duty is, as noted from the above quoted excerpt of Section 109.120(3) supra, he shall file duplicate copies.

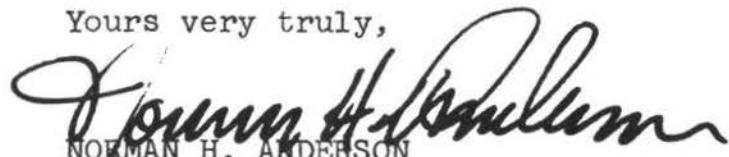
As indicated above, the phrase "or a similar reproduction" is used in Section 109.120(3) instead of specifically naming all the methods of making reproductions which were intended to be included within this class. The process of making microphotographs is very similar to that of making microfilm. Each kind of said reproduction is so small in size that it cannot be read or viewed without being magnified. When reproductions of this kind are used for permanent records, it is the recorder's duty to provide necessary equipment in his office in order for the public to view the records. For these reasons, it is believed to be the legislative intent and purpose in enacting this section to include microphotographs within the classification of "similar reproductions"; and when the recorder uses microfilmed or microphotographic reproductions for recording purposes, he shall make duplicates of all documents so recorded, and shall store one copy in a fireproof vault. The other copy shall be readily available in his office with suitable projection equipment for viewing to a size not smaller than the original document and for reproducing copies of the recorded document when required.

CONCLUSION

Therefore, it is the opinion of this office that when a recorder of deeds records all legally recordable documents by making and filing photostatic or photographic copies of said documents as provided by Section 109.120(3), RSMo. Cum. Supp. 1967, one copy of each original document shall be made. When the recorder records documents by making and filing microphotographic or microfilm copies, duplicate copies must be made.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

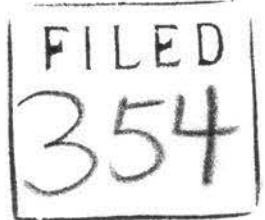

NORMAN H. ANDERSON
Attorney General

Enc. Opinion No. 337-67, Raiffie

CONSTITUTIONAL LAW:
PHYSICIANS:
COMMISSION ON HIGHER EDUCATION:
SCHOOLS:
MEDICAL SCHOOLS:
EDUCATION:
RELIGION:
CONTRACTS:

An agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

OPINION NO. 354



December 19, 1968

Honorable Ben Morton
Executive Secretary
Missouri Commission on Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

Dear Mr. Morton:

This opinion is in answer to your request concerning the constitutionality of a proposal that the state contract with private medical and osteopathic schools in a long range plan to make maximum use of existing facilities and staff, and to provide for the recruitment of young people for the medical profession. This proposal is viewed as one method by which state goals can be accomplished to afford maximum benefits from the use of state funds and in addition strengthen the private institutions now engaged in physician training.

You have also advised us that the Commission indicated that they intend to request legislation to authorize a state agency to administer the program.

It is recognized that the participants of the contract with the State of Missouri as well as the nature of the contract itself necessarily at this point is rather flexible and that other alternatives may have to be considered. Without going into detail concerning the proposal at this time, we will attempt to summarize the principles involved and reach the question of constitutionality regarding the various facets of the proposal.

The major provisions of the contract would require the schools to contract to admit qualified Missourians at a required tuition plus fees charge no greater than similar charges required of medical students by the University of Missouri; require cooperation by the schools with the Missouri Commission on Higher Education or other

Honorable Ben Morton -

appropriate bodies to recruit students for the medical professions; require the state to pay the schools for each Missourian enrolled in an entering class equal or exceeding the average number of Missourians enrolled during a base period and, further, require the state to pay an additional amount per each school per year per student added to the enrollment over the base line.

The questions presented are whether the proposal which contemplates the use of state funds violates the Missouri Constitution as being within the prohibition of Article III, Section 38(a), which states that the General Assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit to any private person, association, or corporation; whether it is violative of similar constitutional provision contained in Article III, Section 39; whether it is in violation of Missouri Constitution, Article I, Sections 5, 6, 7, and Article IX, Section 8, which relates to the doctrine of separation of church and state.

Article III, Section 38(a), states in full as follows:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Article III, Section 39, paragraphs 1 and 2, states as follows:

"The general assembly shall not have power:

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;

Honorable Ben Morton -

"(2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;"

With respect to the constitutional prohibitions above cited, we note first of all that the basic question is whether or not the public funds are expended for a public purpose.

Our Constitution, Article IX, Section 1(a), indicates that the people of Missouri recognized and declared that a general diffusion of knowledge and intelligence was essential to the preservation of the rights and liberties of the people. An examination of the various statutory provisions enacted pursuant to Article IX of the Constitution indicate that the legislature of this state consistently throughout the years has fixed its attention upon effectively providing that the tenets of the Constitution be constructively applied to meet the tremendous change in our social philosophy recognizing that, in line with the programs authorized by the federal government, the education of the people of this state has a direct relationship to the health and welfare of the people. An outstanding example of the legislative declaration of policy is contained in Section 173.095, RSMo Supp., 1967, wherein the legislature stated:

"* * * the general assembly of the state of Missouri declares that state assistance to students of higher education and vocational school students will benefit the state economically and culturally and is a public purpose of great importance."

In addition, with respect to the particular proposal we note that the Missouri Commission on Higher Education views the proposed contract as one method by which state goals can be accomplished, afford maximum benefits from the use of state funds and reach the overall long-range goal of supplying more physicians for the citizens of the state.

We note that the Missouri Supreme Court in State ex rel Garth v. Switzler, 143 Mo. 287, 45 S.W. 245 (1898) held unconstitutional a special tax used to provide gratuitous grants entitling individuals to enter free of matriculation fees and attend any department, school or college of Missouri University and have paid to them, while attending the university, monthly payments for defraying the expenses of school attendance. We conclude that Switzler does not apply to the present situation where the proposal contemplates a contract and exchange of consideration with the school for the instruction of students.

Honorable Ben Morton -

For the same reasons we conclude that related cases such as Simmons Medicine Company et al. v. Ziegenheim, 145 Mo. 368 (1898), are not controlling.

The legislature of the state has long recognized without question their obligation to provide for the health, education and welfare of the people. In our Opinion No. 396, dated 12/10/64, to the Honorable John M. Dalton, we held that the legislation relating to establishment of Missouri State Council on the Arts and defining the Council's powers and duties would not violate the provisions of Article III, Section 38(a) and Section 39 prohibiting the granting or giving of public property or money to private persons.

We conclude that the proposal does not violate these constitutional prohibitions and that the purpose and nature of the proposal is consistent with the furtherance of the public policy of this state to provide for the health, education and welfare of the people.

Insofar as private schools are concerned the question still remains whether or not a contract with a school that is sectarian in nature would violate the provisions of the Missouri Constitution, Article I, Sections 5, 6, and 7, and Article IX, Section 8.

Article I, Section 5, states:

"That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office of trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."

Article I, Section 6, states:

"That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."

Honorable Ben Morton -

Article I, Section 7, states:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

Article IX, Section 8, states:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever."

The other constitutional prohibitions are, of course, applicable to the states by incorporation of the First Amendment of the Bill of Rights into the Fourteenth Amendment of the Constitution of the United States.

In considering this question we assume that the amount proposed to be paid to the sectarian institutions is fair consideration for the services rendered.

The question of separation of church and state has, in its practical application, always been a very perplexing one. It is clear that the sovereign body may deal with a sectarian institution as an entity and not as a sectarian institution in the sense that the institution does not receive public funds or involve the use of public power in aid of the particular religious establishment.

Honorable Ben Morton -

In Kintzele v. City of St. Louis, 347 S.W. 2d 695 (1961) the Supreme Court of Missouri upheld the sale of land by the St. Louis Land Clearance for Redevelopment Authority to St. Louis University for the reason that the Authority's actions did not deprive others of the right to bid for the land, that the University paid not less than the fair value of the land and that the sale was made pursuant to all equitable requirements of law without fraud, bad faith, caprice, or misconduct. In comparing a similar situation involving Fordham University the Supreme Court of Missouri approved the holding of the New York Court of Appeals in finding that since the sale is an exchange of considerations and not a gift or subsidy no aid to religion is involved and a religious corporation cannot be excluded from bidding. It appears from the holding of the court in Kintzele that contracts with sectarian institutions are not invalid per se and that to deal with such a sectarian institution differently than others may be a violation of the constitution. In this latter respect we note particularly the provisions of our Missouri Bill of Rights above cited prohibiting discrimination.

Our earlier Missouri cases recognized definite constitutional conflicts wherein the sectarian school was integrated into the public school system. Berghorn v. Reorganized School Dist. #8, 260 S.W. 2d 573 (1953) and Harfst v. Hoegen, 163 S.W. 2d 609 (1941). In Hoegen the court further held that the prohibitions contained within the Missouri Constitution respecting public aid for religious purposes and institutions go even farther than those of some other states in that it is an explicit interdiction against the use of public money for religion. It appears, however, that the problems confronting the court in Harfst v. Hoegen and Berghorn v. Reorganized School Dist. #8 do not exist in the proposal.

Although we are not in fact considering a "grant" as such in the proposal it is interesting to note that the Supreme Court of Vermont in a decision handed down October 1, 1968, Vermont Educational Buildings Financing Agency v. Mann, applying the standards of Abington School District v. Schempp, 374 U.S. 203, 10 L.Ed 2d 844, 83 S. Ct. 1560 (1963), held that the Establishment Clause of the United States Constitution can be interpreted as permitting the grant of public funds to a church-related but not dominated college. The court found that the main purpose of the act under which the grant was made was to promote the welfare of the people of Vermont and that the act does not discriminate for or against any particular religion. In another recent decision by the Supreme Court of the United States, Board of Education v. Allen, U.S. 20 L.Ed 2d 1060, 88 S. Ct. (1968), the court also applied the Abington "primary effect" test, ascribed to by eight justices, for distinguishing between forbidden involvements of the state with religion and those contracts which the Establishment Clause permits.

Honorable Ben Morton -

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. . . ."

We believe that the standards set forth by the Supreme Court of the United States are applicable in determining whether the provisions of the Missouri Constitution are violated.

We have found it necessary to pass upon the church-state question not because we believe it to be a deterrent in effecting the contract as proposed but for the simple reason that the question has to be considered in any contract between a part of the sovereign body and a sectarian organization. In this respect it is our conclusion that the mere fact that a medical school may be affiliated with or a part of a sectarian institution does not in and of itself preclude its participation in the proposed contract. What is important is that there be fair consideration given by the school in return for what it receives from the state, and the absence of any facts that would indicate the advancement of religion.

Where, as here, there is fair consideration between the state and the institution, there is no grant prohibited by the Constitution either as an aid to private individuals or as an aid to religion.

We conclude that education is a public purpose and that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.


CONCLUSION

It is the opinion of this office that an agency of the state government may be authorized by the legislature to contract and cooperate with private medical schools for the purpose of training Missourians in the medical profession.

Honorable Ben Morton -

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Klaffenbach.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enc: Op. 396, Dalton, 12/10/64

OPINION NO. 355
(Answered by letter--Gardner)

December 4, 1968

Honorable Thomas D. Graham
Representative--122nd District
312 East Capitol Avenue
Jefferson City, Missouri



Dear Representative Graham:

This is in response to your request for an opinion on the question of whether the University of Missouri Extension Council of Cole County may borrow money for the construction of a building to be used by the council.

Your question presumably arises in view of Section 262.590, RSMo Cum. Supp. 1967, which provides in part as follows:

"The council in any county shall have the right and duty to:

* * * * *

(4) Receive by way of gift, purchase, or otherwise acquire, in its own name, real or personal property with the right to hold and to sell and convey title to any such property; provided no real estate not reasonably required for the administration of the extension program shall be held by the council for a period longer than two years."

We are unable to find any authority in the statutes giving the members of the council power to execute a promissory note and a deed of trust securing such note for any purpose, and in the absence of statutory authority, the members of the council have no power to do so. The rule regarding the power of public bodies is tersely stated in Volume 67, C.J.S., Section 107, p. 378, as follows:

"The powers and authority of boards, commissions, and other public bodies are usually defined and limited by law. Boards, commissions, and other public bodies have only such power and authority as are expressly conferred by law or as arise from necessary implication, and any power sought to be exercised must be found within the four corners of the statute under which they proceed. * * * "

Honorable Thomas D. Graham

There is no statutory authority for borrowing money by the extension council and no necessary implication that the council is authorized to borrow money in order to carry out its specific grants of power.

It is, therefore, the opinion of this office that the University of Missouri Extension Council of Cole County is not empowered to borrow money for the construction of a building to be used by the council.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

LJG/jlf

HOSPITALS:
BOARD OF HOSPITAL TRUSTEES:
HOSPITAL TAX:
LEASING HOSPITAL FROM
PRIVATE OWNERS:

A hospital board of trustees created by and acting pursuant to Sections 205.160 to 205.340, RSMo. 1959, as amended, RSMo. Cum. Supp. 1967, may lease existing hospital facilities

from a private organization until a permanent county hospital can be erected. Funds raised by the tax levy authorized by Section 205.200, RSMo. Cum. Supp. 1967, cannot be used to pay the rental on the leased facilities.

Opinion No. 356

October 1, 1968

Honorable Richard J. Blanck
Prosecuting Attorney
Cooper County
Boonville, Missouri



Dear Mr. Blanck:

This is in answer to your letter of July 25, 1968, requesting an opinion in regard to the operation of St. Joseph's Hospital in Cooper County.

You state that the Sisters of St. Benedict will cease operation of the hospital by July 1, 1969, and new arrangements must be made in order to furnish hospital facilities for Cooper County and the surrounding area. It has been suggested that a County Hospital managed by the Board of Hospital Trustees be established pursuant to Sections 205.160 to 205.340, RSMo. 1959, as amended, RSMo. Cum. Supp. 1967. However, a new facility could not be built by July 1, 1969, so temporary arrangements must be made for the interim period. In this regard, you ask the following questions:

"(1) Can Cooper County lease the present hospital facilities from the Sisters of St. Benedict to fill the hospital needs of the area during the interim period, until permanent hospital facilities can be constructed?

"(2) Can funds from the tax levy authorized by Section 205.200, Laws of 1965, be used to pay the rental on said leased facilities?"

In a subsequent telephone conversation you clarified your first question by stating that the existing hospital facilities would be leased by the duly selected Hospital Board of Trustees and not by the County Court.

Honorable Richard J. Blanck -

Section 205.160, RSMo. 1959, reads as follows:

"Establishment and maintenance of hospitals-- bonds.--The county courts of the several counties of this state are hereby authorized, as provided in sections 205.160 to 205.340, to establish, construct, equip, improve, extend, repair and maintain public hospitals, and may issue bonds therefor as authorized by the general law governing the incurring of indebtedness by counties."

A hospital board of trustees is created by Section 205.170, RSMo. 1959, and provision for the election of trustees is made by Section 205.180, RSMo. Cum. Supp. 1967. The duties and powers of the board of trustees are set forth in Section 205.190, RSMo. Cum. Supp. 1967. Among other things, the powers of the board include:

". . .the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose. . ."
(emphasis added)

It can be seen from the foregoing that the board of trustees have the power to lease both buildings and land for hospital purposes. Therefore, it is the opinion of this office that your first question be answered in the affirmative. A hospital board of trustees duly selected may lease existing hospital facilities from the Sisters of St. Benedict until permanent facilities can be constructed.

The second question involves Section 205.200, RSMo. Cum. Supp. 1967, which authorizes the County Court to levy a hospital tax in order ". . .to defray the amount required for the maintenance and improvement of such public hospital and for constructing and furnishing necessary additions thereto. . ." It is this tax along with the revenue from hospital operations which is expected to furnish the money for the maintenance of the hospital. It is the opinion of this office that the proceeds of the tax cannot be used to pay the rental on the leased facilities. The rental cost cannot be construed to be a part of the "maintenance and improvement" expense which can be paid from proceeds collected by the hospital tax. Section 205.200 states that "The funds arising from the tax levied for such purpose shall be used for the purpose for which the tax was levied and none other". In view of this provision, we do not feel that the tax can be used to pay the rental cost involved in acquiring the use of a private hospital.

Honorable Richard J. Blanck -

CONCLUSION

It is the opinion of this office that a hospital board of trustees created by and acting pursuant to Sections 205.160 to 205.340, RSMo. 1959, as amended, RSMo. Cum. Supp. 1967, may lease existing hospital facilities from a private organization until a permanent county hospital can be erected.

It is the further opinion of this office that funds raised by the tax levy authorized by Section 205.200, RSMo. Cum. Supp. 1967, cannot be used to pay the rental on the leased facilities.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Gary G. Sprick.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Norman H. Anderson", written in a cursive style.

NORMAN H. ANDERSON
Attorney General

COUNTIES:

*Compare: ST. Charles,
627 SW₂ 64 (1981)*

County cannot enter into a lease-type agreement for purchase of personal property on payment plan extending over one year without a vote of the people.

OPINION NO. 359

October 29, 1968



Honorable Daniel W. Deiter
Prosecuting Attorney
Montgomery County
Court House
Montgomery City, Missouri 63361

Dear Mr. Deiter:

This is in response to your request for an opinion from this office concerning the following question:

"May a county, or any other political subdivision of the State of Missouri, validly enter into a lease-type agreement, whereby a piece of personal property is acquired with yearly lease payments being made by the political subdivision, extending over a period of one year or more, with the understanding that at the termination of the lease the political subdivision is to receive the property for a nominal consideration, or, where the political subdivision is to receive the property without any additional compensation having been paid to the lessor? This question assumes that there is not adequate unobligated funds in the treasury to pay the purchase price of the piece of equipment, and that the voters of the political subdivision have not voted to incur an indebtedness in excess of the unobligated surplus in the treasury."

Article VI, Section 26 (a), Constitution of Missouri, 19th, provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any

Honorable Daniel W. Deiter

unencumbered balances from previous years except as otherwise provided in this Constitution."

The question of making a long term lease with option to purchase was considered by the Supreme Court in the case of Sager v. City of Stanberry, 336 Mo. 213, 78 S.W.2d 431, in the light of the above constitutional provision which prohibits any municipal corporation from incurring an indebtedness in excess of the anticipated revenue for one year. In the course of its opinion the court stated 78 S.W.2d 431, 437:

"The evidence clearly shows that the city asked for and received bids for the purchase of the machinery included in the Fulton Company contract; that the city proposed to buy this machinery on the installment plan; that the Fulton Company's bid was accepted, and it was agreed, and so understood by the city officials and the representatives of that company, that the purchase price of the machinery with interest be paid in monthly installments over a period of 52 months with title reserved in the vendor until the machinery was paid for. The so-called lease designating the monthly installments as rentals is a patent attempt to disguise the true character of the transaction. The facts and events which we have heretofore stated suffice to demonstrate that it was not a bona fide lease, but in legal effect a purchase and sale of the machinery on the installment plan creating a present indebtedness for the full amount payable in deferred monthly installments. It is said in 19 R. C. L. at page 984: 'The purchase of a single public improvement by installments which in the aggregate exceed the debt limit cannot be accomplished by calling the installments rent, if there is a binding obligation to pay them for a definite period and upon the payment of the last installment title to the property passes to the municipality, or by pledging the municipality's good faith for the payment of the installments when it is recognized that there can be no legal liability, if it is provided that if any installment is unpaid title to the entire property shall revert to the contracting party.' This device of clothing a sale and purchase, whereby the purchase price is to be paid in installments, in the guise of a lease and denominating the installments as rentals with a view to thereby

Honorable Daniel W. Deiter

circumventing constitutional and statutory debt limitations, has been frequently attempted. * * *

In view of the holding of the Supreme Court in this case, it is the opinion of this office that a county cannot validly enter into any lease-type agreement for the purchase of property with the understanding that at the termination of the lease, the political subdivision is to receive the property when there is not sufficient unobligated funds in the treasury to pay the purchase price at the time the agreement is made.

CONCLUSION

It is the opinion of this department that a county cannot legally enter into a lease-type agreement for the purchase of personal property on a payment plan extending over a period of one year or more with the understanding that at the termination of the lease, the county is to receive title to the property when there is not sufficient unobligated funds in the county treasury to pay the purchase price at the time the lease is entered into, unless the county has, by a vote of the people, voted to become indebted for the amount of the purchase.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

STATE BOARD OF EDUCATION: ✓
ELEMENTARY & SECONDARY EDUCATION
ACT OF 1965: ✓
FEDERAL GRANTS: ✓

Review and certification of
Missouri State Department of
Education's Application for
Program Grants for Migratory
Children, FY 1969, Title I, PL
89-10 as amended by PL 89-750.

Opinion No. 363-68
Ans. by letter
DeFeo

August 13, 1968

Mr. Hubert Wheeler
Commissioner of Education
State Department of Education
Jefferson Building
Jefferson City, Missouri 65101



Dear Commissioner Wheeler:

Per your request, we have reviewed Missouri State Department of Education's Application for Program Grant for Migratory Children (Fiscal Year 1969). This grant is being submitted under Title I Elementary and Secondary Education Act of 1965 as amended by PL 89-750 (20 USC, Section 241e).

Our review has taken into consideration Article III, Section 38A, Missouri Constitution, and Section 161.092, RSMo. Supp. 1967.

Based on the foregoing we hereby certify that the Missouri State Board of Education has authority under state law to perform the duties and functions of a state educational agency as defined under Title I of PL 89-10 including those arising from the assurances set forth in the application and that the State Board of Education has authority to submit and administer special educational programs and projects for migratory children as set forth in the application.

This opinion letter constitutes our official certification and should be inserted at an appropriate place in each copy of the application. We are returning herewith one copy of the application.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFeo, Jr.
Assistant Attorney General

LCDJr:rs

Enc.

ms
Opinion No. 370-1968
Ans. by Letter
Chitwood

September 3, 1968

Honorable Winston V. Buford
Prosecuting Attorney
Shannon County Courthouse
Eminence, Missouri

Dear Mr. Buford:

This office is in receipt of your recent request for an official opinion upon two questions concerning nursing home district elections. The first question was answered by a previous opinion of this office, a copy of which has been mailed to you.

Your second inquiry is whether the cost of conducting director elections must be paid by the county court or the nursing home district.

Our previous opinion No. 192, dated April 27, 1966, was written for Honorable Don Owens, State Senator, 20th District, in which one of the questions discussed and answered (in the affirmative) was whether a hospital district was charged and obligated to pay the expense of holding elections for members of the board of directors. In view of the fact that statutory provisions for election of directors of nursing home districts, Section 198.280, RSMo. Supp. 1967, are the same as statutory provisions for election of directors of hospital districts, Section 206.090, RSMo. Supp. 1967, it is believed said opinion answers your second question. A copy of such opinion is enclosed.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure:

Opinion No. 192,
4/27/66, Owens

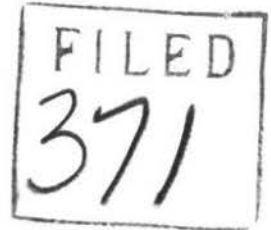
MOTOR VEHICLES:
DRUNK DRIVERS:
DRIVING WHILE
INTOXICATED:

In prosecutions for driving while intoxicated, Section 564.440, RSMo 1959, prior convictions for driving while intoxicated in other states cannot be considered in assessing punishment.

OPINION NO. 371
(Opinion No. 381 is identical)

September 19, 1968

Honorable Henry A. Keeler
Prosecuting Attorney, Pettis County
Courthouse
Sedalia, Missouri 65301



Dear Mr. Keeler:

We acknowledge your letter of August 21, 1968, in which you request an opinion from us on the following question:

"Does a recent conviction for DWI in a sister state followed by a conviction in Missouri Court for the same offense make the conviction in Missouri a first or second offense as contemplated by the terms of the above-mentioned Statute?"

It is our opinion that a sister state conviction for driving while intoxicated cannot be taken into consideration when prosecuting under Section 564.440, RSMo 1967 Cum. Supp. Section 564.-440 reads in pertinent part:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows: * * *"

We find the following general law on the question presented:

"In the absence of an express statute, it is held that conviction of a crime can have no effect by way of penalty or personal disability

Honorable Henry A. Keeler

beyond the limits of the state where the judgment is rendered, and it has been held under particular statutes in some jurisdictions that the previous convictions must be within the state, and that the increased penalty under the statute cannot be imposed where the prior conviction was in another jurisdiction. Under other authority, a prior conviction in another state may be used as the basis for the enhancement of punishment for an offense committed in the state of the forum, even though the statute does not expressly so provide."
24 B CJS, 1960, p. 458.

The Oklahoma Court of Criminal Appeals considered that State's drunk driving statute which read in pertinent part:

"Any persons found guilty of a second offense under the provisions of this Act shall be deemed guilty of a felony. . ."

and held that a person with a conviction for drunk driving in the state of Texas could not be punished as a second offender under the Oklahoma law.

"* * *It has been repeatedly held that penal statutes cannot be enlarged by implication or extended by inference* * *."
Thorp v. State, 250 P 2d 66, 68 (Okla. App., 1952).

A New York Court reached a like result with that State's statute which read as follows:

"Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a felony."

The Court noted the strict construction to be accorded penal statutes, and that the scope of such statutes was not to be limited or extended by judicial interpretation so as to cover a case clearly not within the expressed legislative intent.

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"* * *With respect to the quoted statute in question, it is clear that it does not affirmatively appear that it was the intention of the Legislature that the prior conviction therein referred to be one other than a conviction which occurred in this State. Unless the statute otherwise commands, our court should not decree forfeitures or penalties here because of violations of the criminal laws of another state, [citing authority], but we should give to the statute 'that construction which operates in favor of life or liberty'. [citing authority]. If the quoted statute be intended to prescribe a penalty by reason of a prior conviction in another state, that end should be accomplished by an act of the Legislature expressing such an intent and not by judicial interpretation." People v. Pardee, 117 NYS 2d 515, (NY County Ct., 1952); aff'd. w/o opin. 122 NYS 2d 902 (App. Div., 1953); aff'd. on further app. w/o opin. 116 NE 2d 495 (Ct. Apps., 1953).

In interpreting the phrase "upon a second conviction," in the New Hampshire drunk driving statute, that State's Supreme Court stated:

"* * *The statute obviously refers to a public way within the State of New Hampshire. Whenever a conviction in another state is to be considered in determining whether a second offense has been committed under a local statute the Legislature has so stated in express terms. * * *" State v. Cardin, 156 A 2d 118 (N.H., 1959), l.c. 119.

A New Jersey court similarly construed its statutory phrase, "previous violation of this section."

"[5] It does not affirmatively appear that the Legislature intended the prior conviction to be one pronounced in any state other than New Jersey* * *." State v. Davis, 229 A 2d 682, 685 (N.J. County Ct., 1967).

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The court was impressed by the fact that the State's Habitual Criminal Act and Uniform Narcotics Drug Law expressly referred to out of state convictions.

"Like provision could have been easily made to apply to multiple drunken driving offenses." State v. Davis, supra, l.c. 685.

The Missouri Habitual Criminal Act (Section 556.290, RSMo 1959) and Uniform Narcotics Drug Act (Section 195.200, RSMo 1959) also make specific mention of out of state convictions.

We have found only one jurisdiction that would impute to a subsequent offender penal statute that is silent on the point, extra-state coverage. People v. Poppe, 68 NE 2d 254, (Ill., 1946), Cert. den. 329 U.S. 728:

"The purpose of the Habitual Criminal Act is to punish people who have committed prior felonies more seriously than those who are guilty of a first offense. If plaintiff in error's contention were correct, it would result in penalizing more heavily those who have previously been convicted of offenses in this State and not penalizing as severely persons who have committed the same crimes in other States, regardless of how many times they may have been convicted in other jurisdictions." People v. Poppe, supra, l.c. 256.

Although the logic of the Illinois Court is not without appeal, we feel that such an argument is properly addressed to the legislature. Prior to amendment our Narcotics Drug Act, noted above, contained no express mention of out of state convictions and our Supreme Court ruled that such could not be read into the Act.

"It is suggested by the State, however, that defendant's prior conviction under the Federal Narcotics Act made him a second offender within the meaning of Old § 195.200, thereby subjecting him to the penalties prescribed therein for a 'subsequent offense'. If such a meaning is to be found within the wording of that section--it is explicitly so provided in New § 195.200--we ought to construe it

Honorable Henry A. Keeler

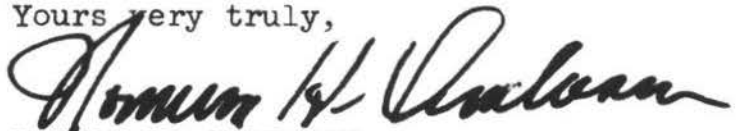
accordingly. However, a careful study of the old section leaves us convinced that in its enactment the legislature did not have in mind violations of the narcotics laws of any jurisdiction other than Missouri, else it would have so stated; as does New § 195.200." State v. Edwards, 317 SW 2d 441, 448 (banc, 1958).

CONCLUSION

Accordingly, it is the opinion of this office that in prosecutions under Section 564.440, convictions outside the State of Missouri cannot form the basis for invoking the subsequent offenses punishment provisions of this statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Norman H. Anderson".

NORMAN H. ANDERSON
Attorney General

November 13, 1968



OPINION NO. 373

Answered by Letter - Brannock

Honorable J. H. Frappier
24th District
2335 Hummingbird Drive
Florissant, Missouri 63031

Dear Mr. Frappier:

We have your letter of August 22, 1968, requesting an opinion of this office, which reads as follows:

"I have received numerous complaints regarding the tax exemption status of public and not for profit private schools with respect to the sales and use tax. Specifically, there seems to be a good deal of confusion relative to the payment of sales tax on the cost of printing of the school year books.

"Typically, the schools will sell the year books to students at a price substantially below the cost of printing. The difference between the sales price and printing cost is normally raised through the sale of advertising space. Of course, the preparation of the year book is a phase of the curriculum for the Journalism students.

"It is my understanding that some Missouri schools pay the sales tax but the vast majority do not. Would you please advise as to your opinion regarding the payment of sales tax on these printing costs. It is my understanding that someone has issued an opinion that all year books, regardless of the school's exemption status, are taxable because they are purchased for resale.

"Your clarification of this situation will

Honorable J. H. Frappier

be appreciated."

There are two types of schools within the State of Missouri, public and private. With regard to sales tax application mentioned in your letter, we enclose herewith copy of Attorney General Opinion No. 64, dated April 20, 1954, issued to Mr. M. E. Morris, which deals with a private school, Wentworth Military Academy, which is incorporated under a Pro Forma Decree.

The conclusion therein is that Wentworth Military Academy is not exempt from the Missouri sales tax upon purchases made to or sales made by such organization.

Rule No. 5 adopted by the Department of Revenue of the State of Missouri revised October 13, 1967, in its concluding paragraph on page 60 states:

"All purchases or sales made by or to private schools, such as military, trade or finishing schools and other such private institutions, are subject to tax."

With regard to public schools and their suppliers relative to sales and use tax, Rule No. 6, pages 60 and 61, Department of Revenue, Missouri Sales Tax Rules, states as follows:

"Sections 144.040 and 144.615(3) clearly exempts from tax purchases or sales made by schools supported by public funds or religious organizations, when said purchases are paid for by public funds, or funds belonging to said institutions and where such items purchased are used in the conduct of regular educational or religious functions and activities.

"When schools purchase equipment or supplies for use by individuals, that does not become the property of the school and when paid for from funds not belonging to the school or with funds collected from or to be collected from students, tax should be paid on such purchases. This includes athletic equipment, musical instruments and supplies, books and such other material, which becomes the property of the individual purchasing same.

"Therefore, when orders are placed for school equipment or supplies it should be clearly

Honorable J. H. Frappier

indicated in the purchase order whether or not the goods are to become the property of the school or an individual. Where practical, separate order blanks should be used so that the seller can recognize the taxable items purchased. Sales or purchases of property under an arrangement where an individual or a school takes orders from students and makes a combined or single purchase for the individual benefit and use of the students are not exempt and tax must be collected by the vendor or seller.

"Suppliers or retailers selling rings, pictures, sweaters, jackets, school annuals, musical instruments, shoes, and similar items or the rental of gowns, caps and other items, which are for the personal, individual benefit and use of a student should include and collect the sales or use tax on such sales or rentals. Purchase orders should designate if purchases are for school purposes and not for student's individual and personal benefit ownership, and if the purchases are for the school's purposes as part of their regular educational activities no tax should be collected by the sellers. (Examples of non taxable situations: When a school purchases books, desks, school supplies, and equipment, diplomas, medals, awards or cups, athletic, musical or other equipment and supplies purchased for the athletic and other departments, and for the general use by or benefit of all students entered or engaged in regularly sponsored school athletic or other educational programs, classes, events or activities.)

"Operators of vending machines or commissaries located in schools, but not operated by the schools or any school group, are required to report the tax on the gross receipts from these vending machines or commissaries operated by them. (See rule 67.)

"Tax need not be collected on admissions charged to school plays or entertainments sponsored as a part of the regular school program as such programs are considered normal school activities; on the other hand, when entertainments, programs,

Honorable J. H. Frappier

etc., are put on by individuals, entertainers or groups thereof, who make this a business and receive as compensation therefor a portion of the net receipts, then the Sales Tax must be collected on the admission charge even though sponsored by the school and the profits, if any, are used for school purposes."

The Department of Revenue under the above rule requires the school, when it receives the school annual or other personal property to be paid for by the student, to pay to the printer or supplier sales tax on the entire charge made by the printer or supplier.

Very truly yours,

NORMAN H. ANDERSON
ATTORNEY GENERAL

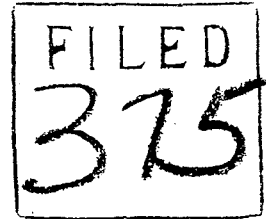
Encl. - Op. No. 64-Morris

HOSPITALS:
HOSPITAL DISTRICTS:
AMBULANCE SERVICE:

The Reynolds County Hospital District organized under Chapter 206, RSMo., may provide an ambulance service to the inhabitants of the hospital district as an incident to the operation of the hospital. Such service may only be provided after the hospital is established. The District cannot furnish a general ambulance service provided for in Section 67.300, RSMo. Supp. 1967.

OPINION NO. 375

December 12, 1968



Honorable William H. Bruce, Jr.
Prosecuting Attorney
Reynolds County Court House
Centerville, Missouri 63633

Dear Mr. Bruce:

This is an answer to your letter of August 27, 1968, asking our office for an official opinion on the following question:

"The County Court has received a petition asking it to provide ambulance service under Section 67.300 and does not wish to do so.

Can the Reynolds County Hospital District organized under Chapter 206 provide such service? If so, can the District provide such service, even before the hospital is completed?"

Chapter 206, RSMo Cum. Supp. 1967, which is known as the Hospital District Law, sets forth the procedures by which a hospital district is created and the powers that the district exercises. Specifically, the powers that a hospital district can exercise are set out in Section 206.110. Subsection 1 of that section states that a hospital district has the power:

"To establish and maintain a hospital and hospital facilities within its corporate limits, and to construct, acquire, develop, expand, extend and improve any such hospital or hospital facility."

This section gives the hospital district, through its directors, the power to operate and manage the hospital and hospital facilities, and to charge and collect reasonable fees and compensation for the

Honorable William H. Bruce -

use of the hospital and hospital facilities, and for other services furnished by the hospital and hospital facilities. The hospital district has power to enter into contracts for the employment of persons and corporations who furnish services which are necessary or desirable in accomplishing the purposes of the hospital district. The law does not make any specific reference to ambulance service, therefore, if a hospital district is to have the power to furnish ambulance service to the persons living within the district, this power must be inferred from those powers which are specifically delegated by the statutes.

Subsection 6 of Section 206.110 states that a hospital district has power:

"To employ or enter into contracts for the employment of any person, firm, or corporation, and for professional services, necessary or desirable for the accomplishment of the corporate objects of the district or the proper administration, management, protection or control of its property."

Pursuant to this provision a hospital district may employ professional services which aid in accomplishing the corporate objects of the district. We feel that an ambulance service comes within the ambit of medical and professional services. The corporate objects of the hospital district are to provide hospital care and protection for the inhabitants. We think that an ambulance service aids in accomplishing the general, broad objects of the hospital district. In many cases, it is indispensable in order that a person may avail himself of the hospital, hospital facilities, and hospital services. Therefore, it is the opinion of this office that a hospital district can furnish ambulance service to the inhabitants of the hospital district since it aids in accomplishing the corporate objects of the district.

However, it is also our opinion that an ambulance service cannot be provided before the hospital is completed since it is an incident to the operation of the hospital. There is no authority for a Hospital District to furnish a general ambulance service provided for under provisions of Section 67.300, RSMo. Supp. 1967.

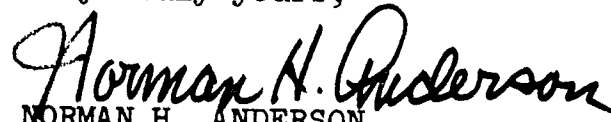
CONCLUSION

The Reynolds County Hospital District organized under Chapter 206, RSMo., may provide an ambulance service to the inhabitants of the hospital district as an incident to the operation of the hospital. Such service may only be provided after the hospital is established. The district cannot furnish a general ambulance service provided for in Section 67.300, RSMo. Supp. 1967.

Honorable William H. Bruce -

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary G. Sprick.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

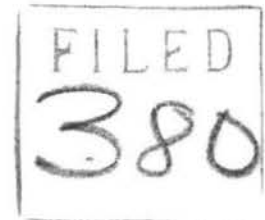
BONDS:
INDUSTRIAL DEVELOPMENT:
COMPETITIVE BIDS:
APPROVAL OF INDUSTRIAL
PROJECTS BY DIVISION
OF COMMERCE AND INDUS-
TRIAL DEVELOPMENT:

A city of the 4th class under a lease agreement pursuant to industrial development revenue bond issues under Chapter 100, RSMo Cum. Supp. 1967, need not follow the procedure of competitive bidding for the construction of the proposed facility thereunder, and that under Section 100.200, any purchase options entered into in compliance with

the statutes and approved by the Division of Commerce and Industrial Development need not be further approved at the time of their actual exercise.

OPINION NO. 380

November 14, 1968



Mr. Ray V. Jeffrey, Director
Industrial Development
Division of Commerce and
Industrial Development
Jefferson Building
Jefferson City, Missouri

Dear Mr. Jeffrey:

This is in response to your inquiry regarding industrial development revenue bonds, which you posed as follows:

"On August 23, 1968, New Madrid, a City of the Fourth Class, voted by the requisite majority an Industrial Development Revenue Bond issue under Chapter 100, RSMo Cum. Supp. 1967, under the terms of the lease agreement for the facility to be negotiated with Noranda Aluminum, Inc., a Delaware Corporation. The peculiar engineering involved in the construction of this primary aluminum reduction plant necessitates the use of an engineering company, in this case Kaiser Aluminum Engineering Department.

Two legal questions have arisen in the course of our involvement with this project, which we have the statutory and administrative responsibility of approving.

First, must the municipality let out bids for the construction of this facility under present section 100.170, RSMo, since only Industrial Development Revenue Bonds will be issued?

Mr. Ray V. Jeffrey

Secondly, under section 100.200, enacted pursuant to amended Article VI, Section 27, Missouri Constitution, where the lease agreement between the city and the company provides for options by the company to buy all or portions of the real estate involved in the industrial project and owned by the city, and which project has been approved by our Division including such option terms, must the Division of Commerce subsequently approve or reapprove at the time the option to purchase is exercised?"

We believe your first question is settled by the case of Wring vs. City of Jefferson, (Mo. Sup. en banc, 1967), 413 S.W. 2d 292. There, the city and Interco proposed an agreement providing that proceeds of revenue bonds pursuant to the provisions of Sections 71.790 to 71.850, RSMo Cum. Supp. 1965 (now Sections 100.010 through 100.190, RSMo Cum. Supp. 1967), would be used to pay for constructing a plant by the city which would then be leased to the company, Interco. An injunction was granted by the lower court but the Supreme Court reversed and held that a city of the 3rd class could carry out the project. Since the project was financed by revenue bonds solely, the court held that the statute requiring competitive bidding (71.843; now 100.170) did not apply. Since you have advised us that the project of the fourth class city of New Madrid, which qualifies as a "municipality" under Section 100.010, likewise only involves industrial development revenue bonds under Chapter 100, it is clear that competitive bidding will not be required of the proposed facility.

Your second question concerns present Section 100.200 which reads as follows:

"Any municipality may sell or otherwise dispose of the property or buildings or plants, acquired with the proceeds from the sale of revenue bonds issued under sections 100.100 to 100.190, to private persons or corporations for manufacturing or industrial development purposes upon approval by the division of commerce and industrial development or its successor agency. The terms and method of the sale or other disposal shall be established by the division so as to reasonably protect and promote the economic well-being and the industrial development of the municipality, but in no case shall the property

Mr. Ray V. Jeffrey

or buildings or plants be sold for an amount less than one which shall be sufficient to retire all outstanding revenue bonds which were sold for the purchase or construction of the property or buildings or plants."

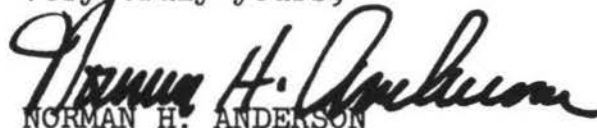
This new section is based on amended Section 27 of Article VI, Constitution of Missouri, allowing revenue bonds to be adopted by a four-sevenths vote. Under the statute the city is empowered to dispose of the property within terms established by your Division. We see nothing in the statute to prohibit your Division establishing such terms at the time of the original agreement between the city and the company involved so long as the statute is complied with at that time, and the procedures which are thus established are adhered to at the time when any such option is exercised.

CONCLUSION

It is, therefore, the opinion of this office that a city of the fourth class under a lease agreement pursuant to industrial development revenue bond issues under Chapter 100, RSMo Cum. Supp. 1967, need not follow the procedure of competitive bidding for the construction of the proposed facility thereunder; and that under Section 100.200, any purchase options entered into in compliance with the statutes and approved by the Division of Commerce and Industrial Development need not be further approved at the time of their actual exercise.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

OFFICERS:
OFFICE OF PROFIT:
PROBATE JUDGE:
MAGISTRATE:

Probate Judge/ex officio Magistrate
may not simultaneously serve as
United States Commissioner pursuant
to 28 USCA, Section 631.

Opinion No. 382

October 29, 1968

The Honorable Winston V. Buford
Prosecuting Attorney
Shannon County
Eminence, Missouri 65466



Dear Mr. Buford:

With reference to your recent request for an opinion as to whether a Missouri lawyer can serve as a duly elected magistrate and probate judge of a fourth class county and also accept an appointment as a United States Commissioner, it is our opinion that such dual office holding is prohibited.

We believe the following constitutional provision to be the principal objection to a person simultaneously occupying the position of probate judge/ex officio magistrate and that of a United States Commissioner:

"No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted."
Article VII, Section 9, Constitution of Missouri.

The Supreme Court of Wisconsin had occasion to construe a similar constitutional provision on a nearly identical set of facts. Their constitution reads in part:

"No member of Congress, nor any person holding any office of profit, or trust under the United States (postmasters excepted), * * * shall be eligible to any office of trust, profit or honor in this state."

The Wisconsin Court accordingly ruled that a person accepting appointment as a United States Commissioner had thereby vacated the office of Circuit Court Commissioner. The Court noted that a United States Court Commissioner was clearly an office of profit or trust under the United States (citing therefore, United States v.

Honorable Winston V. Buford

Mouat, 124 U.S. 303, 31 L.Ed. 463; United States v. Germaiur, 99 U.S. 508, 25 L.Ed. 482; United States v. Smith, 124 U.S. 525, 31 L.Ed. 534) and concluded as follows:

"The relator seeks to escape the plain language of the constitutional provision referred to on the ground that the two offices are not incompatible, and also on the ground of practical construction. The question of incompatibility of the two offices is foreclosed by the constitutional provision referred to, and not open for consideration. This provision of the Constitution is clear, and no room is left for practical construction. * * *" State ex rel. Hazelton v. Turner, 169 NW 304, (Wis., 1918).

We are persuaded that the same result must obtain in Missouri.

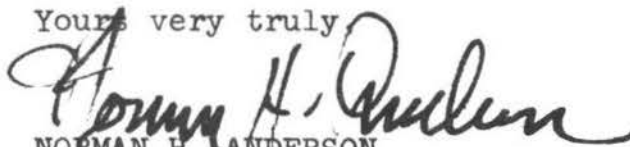
This office earlier construed Section 9, Article VII to mean that the mayor of a third class city would be prevented from serving as an officer in the Small Business Administration of the Federal Government, although we therein indicated that a civil servant employee of the Federal Government would not necessarily be a holder of an "office of profit under the United States." However we believe there can be no doubt but that a United States Commissioner appointed pursuant to 28 USCA, Section 631, must be considered a holder of an "office of profit under the United States." (Go-bart Importing Company v. United States, 282 US 344, 75 L.Ed. 374 (N.Y., 1931); Jaben v. United States, 381 US 214, 14 L.Ed. 2d 345 (Mo., 1965)). Certainly a probate judge/ex officio magistrate is the holder of an "office of profit in this state." (Section 482.150, RSMo 1967 Cum. Supp.)

CONCLUSION

It is the opinion of this office that a person elected to the office of probate judge/ex officio magistrate (Article V, Section 18, Constitution of Missouri) cannot simultaneously occupy the position of United States Commissioner (28 USCA, § 631).

The foregoing opinion, which I hereby approve, was prepared by my assistant Louren R. Wood.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

FILED
384

November 13, 1968

OPINION LETTER NO. 384-68
Answered by Letter
DeFeo

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
415 West Main Street
Savannah, Missouri 64485

Dear Mr. Lance:

This letter is in response to your request for a ruling. You inquire as to the proper method of calculating the cost of transportation of non-resident high school pupils under Section 167.241, RSMo. Supp. 1967.

The facts of which you inform us are as follows: The R-IX School District of Andrew County does not operate a high school, but sends its high school pupils to the adjacent R-III School District under authority of Section 167.131, RSMo. Supp. 1967. These high school pupils of the R-IX District were transported on school busses of the R-III School District. Some of the R-IX pupils did not ride the school bus every day. One rode the bus only 17 out of 176 school days. The R-III School District billed the R-IX School District for the cost of the transportation by the following method: The total cost of transportation was divided by the number of students to arrive at a cost per student per year. This amount was multiplied by the number of students from the R-IX School District without regard to the number of days the R-IX pupils rode the bus to arrive at the total cost charged to the R-IX District.

Section 167.241, RSMo. Supp. 1967, provides as follows:

"Transportation for high school pupils whose tuition the district of residence is required to pay by section 167.131 may be provided by either the school board of the district of residence or by the school board of the district attended but any cost incurred by the

Honorable Alden S. Lance

district attended in transporting a pupil in excess of the amount allowed for state aid as determined in section 163.161, RSMo., may be collected from the district of the pupil's residence."
(Emphasis added)

Section 167.241 clearly provides that the transporting district may seek reimbursement from the sending district for the cost of transportation, less state aid. The statute does not spell out a particular formula for calculating the cost of transportation. Compare, for example, Section 167.131 regarding the calculation of tuition of non-resident high school pupils. We are of the view that the statute intends that the actual costs of transportation of the non-resident high school pupils should be determined and that amount, less state aid, collected from the sending district.

The determination of actual cost must be made by taking into consideration all the elements going into the cost of transportation. These elements will, of course, vary from situation to situation depending upon such things as depreciation of equipment, salaries of necessary personnel, miles traveled and the route established in connection with picking up students who are residents of the transporting district, etc. The calculation of costs may or may not be affected by whether or not the pupil actually rides the bus on any specific day. For example, if the bus makes the trip to pick up the pupil and finds on arriving that the pupil is ill and unable to attend school that day, nevertheless expense may have been incurred in sending the bus to the pupil's home.

We are unable to say whether or not the method of calculating costs used by the R-III School District is correct since we do not know all the factors going into the cost of transportation in that district. The determining principle is whether or not the amount is the actual cost of transporting the non-resident high school pupils, less state aid.

Therefore, it is the opinion of this office that a school district transporting non-resident high school pupils may collect from the district of the pupils' residence the actual cost of transportation, less state aid. This amount cannot be determined by any arbitrary calculation based upon attendance or nonattendance, but must be a determination of actual costs.

Yours very truly,

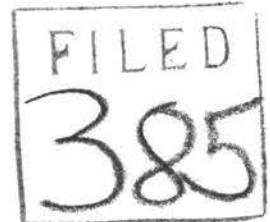
NORMAN H. ANDERSON
Attorney General

BONDS:
ELECTIONS:
CONSTITUTIONAL LAW:

A vote on November 5, 1968, by a municipality to issue general obligation bonds, will not pass if more than 60%, but less than 66-2/3% of the vote is favorable, even though on the same date a proposed constitutional amendment to reduce the percentage requirement to 60% for the issuance of such bonds obtains a majority vote.

OPINION NO. 385

October 17, 1968



Honorable Maurice Schechter
State Senator - 13th District
Missouri Senate
41 Country Fair Lane
Creve Coeur, Missouri 63141

Dear Senator Schechter:

This is to acknowledge receipt of your request for a formal opinion from this office which reads in part as follows:

"On the ballot on November 5th, will be the proposal to reduce the percentage requirements to pass general obligation bonds from 66-2/3% to 60% and it is my understanding that such constitutional amendments are self enforcing but the question arises as to when the same becomes effective.

"This municipality has a proposal on the ballot on such date authorizing a bond issue and if the state proposal passes reducing the percentage of 60%, would that be effective on November 5th or would the same be effective when certified by the Secretary of State which I believe to be the law and if the same is effective on November 5th, would the bond issue proposal by such municipality on that date pass if the same receives a vote margin of 60% or more."

Honorable Maurice Schechter

The constitutional amendment referred to above is set forth in Senate Joint Resolution No. 6. This resolution submits to the qualified voters of Missouri on November 5, 1968, a proposal to repeal Sections 23(a), 26(b), 26(c), 26(d), 26(e), and Section 27 of Article VI of the Constitution of Missouri and adopt seven new sections in lieu thereof, relating to the same subject. One of the features of the proposed amendment would be to reduce percentage requirements of voter approval from 66-2/3% to 60% in regard to general obligation bonds of certain political subdivisions. Therefore, the issue for our determination is whether or not a vote on November 5, 1968, by a municipality to issue bonds, will pass if more than 60%, but less than 66-2/3% of the vote is favorable, provided that on the same date the proposed constitutional amendment to reduce the percentage requirement to 60% for the issuance of such bonds obtains a majority vote.

The procedure for amending the constitution is set forth in Article XII, Section 2(b) of the Constitution of Missouri. Said section reads in part as follows:

"All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. * * * * *

If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election.* * * *" (emphasis ours)

Therefore, if the proposed amendment is approved by the majority of voters, it is our belief that the percentage requirements of voter approval in the constitution relating to the indebtedness of certain political subdivisions would be reduced from 66-2/3% to 60% and become effective 30 days after the election. It is to be noted however, that at the time of the municipal election on the bond proposal, November 5, 1968, the constitutional requirement of 66-2/3% of voter approval relating to financial indebtedness of certain political subdivisions will still be in effect. Consequently, we find no authority to hold that the bond issue proposal by such municipality would pass if the same receives less than 66-2/3% of voter approval on November 5, 1968.

CONCLUSION

It is the opinion of this office that a vote on November 5, 1968 by a municipality to issue general obligation bonds, will not

Honorable Maurice Schechter

pass if more than 60%, but less than 66-2/3% of the vote is favorable, even though on the same date a proposed constitutional amendment to reduce the percentage requirement to 60% for the issuance of such bonds obtains a majority vote.

The foregoing opinion, which I hereby approve, was prepared by my assistant, B. J. Jones.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

BJJ:fb

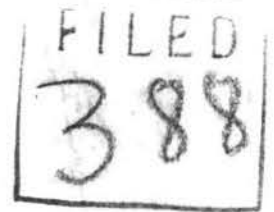
MOTOR VEHICLES:
LIMITED DRIVING PRIVILEGES:

my
A court cannot grant a limited hardship privilege where a license has been revoked under the provisions of Section 302.291, RSMo.

OPINION NO. 388

December 12, 1968

Honorable Thomas A. David
Director of Revenue
State of Missouri
Jefferson Building
Jefferson City, Missouri 65101



Dear Mr. David:

This is in answer to your request for an opinion from this office concerning the question whether or not a limited driving privilege can legally be granted by a court to a person whose driving privilege has been revoked under the provisions of Section 302.291, RSMo (found by examination to be incompetent or unqualified to retain his license or because he refused or neglected to submit to the examination).

It is our opinion that this cannot be done. Section 302.291 provides that:

"The director, having good cause to believe that an operator, or chauffeur is incompetent or unqualified to retain his license, after giving ten days' notice to such person in writing by registered mail directed to his present known address, may require him to submit to the examination provided by section 302.173. Upon conclusion of the examination the director may allow the licensee to retain his license, may suspend or revoke the license of the licensee, or may issue to the examinee a license subject to restrictions as provided in section 302.301. The refusal or neglect of the operator or chauffeur to submit to such examination shall be ground for suspension or revocation of his license by the director, a magistrate or circuit court."

Section 302.309, subsection 3, (5), RSMo Supp. 1967, says:

Honorable Thomas A. David

"No person is eligible to receive hardship driving privilege whose license has been suspended or revoked for the following reasons:
* * * (b) Who at the time he applies for such hardship driving privilege would not be eligible for a chauffeur's or operator's license because of the provisions of subdivisions (1), (2), (4), (5), (6), (7) and (8) of section 302.060;"

Section 302.060, (6), RSMo Supp. 1967, says that no license shall be issued:

"To any person, either as a chauffeur or as an operator, who, when required by this law to take an examination, has failed to pass said examination;"

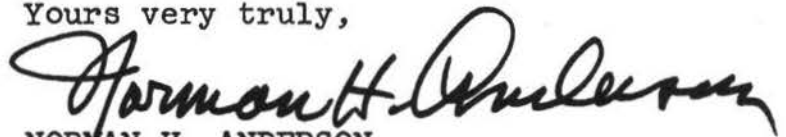
Therefore, one who has not passed the examination, either through failure on the actual test or refusal or neglect to take it, is not eligible for a hardship driving privilege.

CONCLUSION

Therefore, it is our opinion that a court cannot grant a limited hardship privilege where a license has been revoked under the provisions of Section 302.291, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

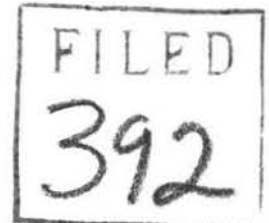
Yours very truly,



NORMAN H. ANDERSON
Attorney General

MS
Opinion No. 392
Answered by letter - Wood

October 14, 1968



The Honorable William R. Antoine
State Representative, District 23
12101 Newbury Lane
Independence, Missouri 64052

Dear Representative Antoine:

We acknowledge receipt of your recent letter in which you stated the following question:

"What are the specific duties and responsibilities of a County Civil Defense Agency as are required by Chapter 44.080 (1) Missouri Revised Statutes when jurisdictionally all political subdivisions (cities, towns, villages, and fire districts) within such county are in immediate contiguity and no territorial area remains outside of such politically defined subdivisions?"

The question postulates the factual situation of a county in which the entire area is absorbed by cities, towns, villages, or fire districts, all of which have their own civil defense organizations. Assuming this to be the actual situation in one or more counties of the State, then it is our view that the county civil defense organization would have no immediate duties or responsibilities in such a county. We can discern no legislative intention to give to the counties any superintending control over the civil defense organization of cities, towns, villages, or fire districts.

"Generally speaking, the function of a county is to serve as an agency or instrumentality of the state for purposes of political organization and local administration. Counties possess only such powers as have been expressly delegated to them by statute or which are necessarily or reasonably implied from the powers expressly granted to them. These powers, of course,

Honorable William R. Antoine -

may be modified or taken away. A county is generally clothed with duties of a local administrative character. * * *"
14 Am. Jur., Counties, §5, p. 188

We believe civil defense to be in the nature of a police power normally delegated by the state to municipalities, and not to counties, which are mere arms of the state government.

"A county is a subdivision of the state, organized for judicial and political purposes. In other words, it is a political organization of certain of the territory within the state, particularly defined by geographical limits. It is not invested with any of the attributes of sovereignty. In other words, a county is a constituent part of the state government -- a wholly subordinate political division or instrumentality, created and existing with a view to the policy of the state at large and serving as an agency of the state for certain specified purposes. * * *"
14 Am. Jur., Counties, §3, p. 185

Since counties are not the repository of general governmental powers, but possess only such powers as are specifically conferred upon them by the state legislature, it is our opinion that counties are not to perform civil defense functions in areas of the county within cities, towns, villages, or fire districts having their own civil defense organization.

However, we note that political subdivisions are authorized, with the governor's approval, to enter into mutual aid agreements with other public agencies for reciprocal emergency aid (§44.090, RSMo. 1967 Cum. Supp.). Furthermore, during an emergency the governor may direct the officers and employees of any political subdivision to render services and provide facilities as may be needed for carrying out civil defense functions within the state (§44.110, RSMo. 1967 Cum. Supp.). In this event, the governor might well direct a county civil defense organization to carry out civil defense functions throughout the county.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

OFFICERS:
PUBLIC OFFICERS:
COMMITTEEMEN:

One can hold the offices of United States Representative in Congress and party committeeman concurrently.

OPINION NO. 395

October 29, 1968



Honorable Johnnie S. Aikens
State Representative - 74th District
Missouri House of Representatives
5145A Delmar Boulevard
St. Louis, Missouri 63108

Dear Representative Aikens:

This is in response to your request for an opinion as to whether a ward or township committeeman can hold the office of United States Representative in Congress.

The Missouri Constitution, Article VII, Section 9 sets forth a restriction upon the holding of two offices concurrently, one federal and the other state. It provides: "No person holding an office of profit under the United States shall hold any office of profit in this state, members of the organized militia or of the reserve corps excepted." Although it has been held that a committeeman is a public officer, *Noonan v. Walsh*, 273 S.W.2d 195, 196 (Mo. 1954), the office of committeeman is not an office of profit. Therefore, the restriction in the Missouri Constitution provides no barrier.

Likewise, there are no provisions in the United States Constitution which would prevent the holding of these two offices concurrently. Article I, Section 6 merely prevents one who is holding an office under the United States from being a member of either house of the United States Congress during his continuance in office.

The only other possible restriction is the common law rule against holding incompatible and inconsistent offices concurrently, as set forth in *State ex rel Walker v. Bus*, 135 Mo. 325, 36 S.W. 636, 637 (1896). It was said there that incompatibility does not consist of a physical inability of one person to perform the duties of two offices, but there must be some inconsistencies in the functions of the two, some conflict in the duties required of the officers. 67 C.J.S., Officers, Section 23, page 135 says:

Honorable Johnnie S. Aikens

" . . . the inconsistency, . . . lies . . . in a conflict of interest, as where one [office] is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or the power to remove the incumbent of the other, or to audit the accounts of the other, the question being whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other "

We find no such conflict here. The duties of a committeeman, in representing and acting for his party, must be carried out with a view towards the public interest since he is, according to the Missouri Supreme Court, a public official. In this respect, there is no inconsistency between the two offices. Also, there is no way in which a congressman could use his office as committeeman to secure his renomination as the party candidate for United States Representative, as this decision is made by the voters in the primaries.


Therefore, we find no incompatibility between the two offices.

CONCLUSION

It is our opinion that one can hold the offices of United States Representative in Congress and party committeeman concurrently.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Richard L. Wieler.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

ELECTIONS:
CHALLENGERS:
WATCHERS:
POLITICAL PARTIES:

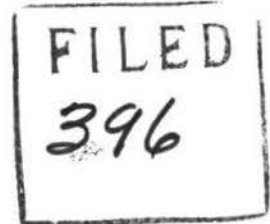
A new political party organized under the provisions of Section 120.140, RSMo et seq. is a political party within the provisions of the statutes relative to the selection of challengers and

watchers. There are no statutory provisions for challengers in areas other than Clay County, Jackson County, St. Louis County, Kansas City, and the City of St. Louis in general elections.

OPINION NO. 396
Amended August 11, 1976

October 25, 1968

Honorable Clinton Almond
Prosecuting Attorney
Court House
Hillsboro, Missouri 63050



Dear Mr. Almond:

This is in response to a request from your office for an opinion concerning the question of whether or not a new political party constituted by the filing of a petition pursuant to the provisions of Section 120.160, RSMo 1959, may designate watchers or witnesses to the counting of ballots in the forthcoming general election.

First of all, we call your attention to Section 120.140, RSMo 1959, which states in part:

"1. The term 'political party' as used in sections 120.140 to 120.230 shall mean any 'established political party' as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party provided for in sections 120.140 to 120.230; * * *"

The term "established political party" however, is specifically defined in paragraphs 2 and 3 of Section 120.140 and in order to be declared such the party must meet the requirements as stated specifically below:

"2. An 'established political party' is hereby declared to be a political party which, as to the state, at the last general election for state and county officers, polled for its candidate for governor more than two per cent of the entire vote cast for governor in the state;

Honorable Clinton Almond -

and, as to any district or political subdivision of the state, a political party which polled more than two per cent of the entire vote cast in such district or political subdivision at such election.

"3. A political party, which in any congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, polled more than two per cent of the entire vote cast within such congressional district, senatorial district, county, township, school district, municipality or other district or political subdivision of the state, where such district or political subdivision, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district or political subdivision, is hereby declared to be an 'established political party' within the meaning of sections 120.140 to 120.230 as to such district or political subdivision."

We also direct your attention to Section 120.170, RSMo 1959, which states in full as follows:

"If any such new political party shall become an established political party in the manner provided in sections 120.140 to 120.230, the candidate or candidates of such new political party nominated by the petition referred to in section 120.160 for such initial election, shall have power to select party committeemen and committeewomen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for the party within the state, or in any district or political subdivision in which the new political party has become established. The party committeemen and committeewomen so selected shall constitute a provisional party organization for said new political party and shall have and exercise the powers exercised by law upon any party committeemen and committeewomen to manage and control the affairs of such new political party until the next ensuing primary election at which the new political party

Honorable Clinton Almond -

shall be entitled to nominate and elect any party committeemen and committeewomen in the state, or in the district or political subdivision under the same laws now or hereafter enacted relating to the organization and rights of political parties."

It is clear from a reading of this section that before any party has the authority to select party committeemen and committeewomen necessary for the creation of a provisional party organization for the party within the state with power to control the affairs of such new political party, such party must be an established political party within the meaning of Section 120.170.

Although Section 120.160 provides that the filing of such a petition shall constitute the political group a new political party, nevertheless this section specifically states that the political group is a new political party for the purpose only of placing the party candidates on the ballot at the next ensuing election. Section 120.160, paragraph 2, to which we refer states in part as follows:

"The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at the next ensuing election the list of party candidates for offices to be voted for throughout the state, or for offices to be voted for in the district or political subdivision less than the state, as the case may be, under the name of, and as candidates of such new political party. * * *"

With respect to the general provisions for witnesses at elections we note that Section 111.610, RSMo 1959, states in part:

"* * *No person or persons shall be admitted into the room or office where such ballots are being counted, except the judges and clerks of election; provided, that any political party may select a representative man who may be admitted as a witness of such counting. * * *"

Sections 113.200, RSMo 1959, and 113.205, RSMo Supp. 1967, which apply to challengers and watchers in St. Louis County provide respectively:

Honorable Clinton Almond -

"113.200. Challenging during registration and election authorized.--At every registration and election each of the political parties shall have the right to designate and keep a challenger during the hours of registration, revision and voting, and a watcher during the counting of the ballots in each place of registration, revision or voting, who shall be assigned such position, immediately adjoining the judges of election inside the polling or registration booth as will enable him to see each person as he offers to register or vote, and who shall be protected in the discharge of his duty by the judges of election. Said challengers and watchers shall be named by the central committee of their respective parties, who shall issue in writing a certificate of appointment which shall be signed by the chairman of said committee, or, on his refusal to do so, by a majority of said committee."

"113.205. Challengers, qualifications, duties.--Every person designated a challenger or watcher as provided in section 113.200 must be a registered voter residing within the county in which he serves, and in addition each challenger at a place of voting must be a resident to that ward or township in which he serves. Each challenger or watcher shall report any violation of the election laws of this state to the official or body in charge of registration or to the election judges as the case may be. Nothing contained in this section shall restrict the rights of a challenger or watcher to report violations of the election laws to the proper law enforcement authorities in accordance with his rights as a private citizen."

Section 113.870, RSMo Supp. 1967, relating to challengers in Jackson County, outside of Kansas City, provides:

"At every election, each of the political parties may designate and keep a challenger in each voting place, who shall be assigned such position, immediately adjoining the judges of election, inside the polling place, as will enable him to see each person offering to vote, and who shall be protected in the discharge of his duty by the judges

Honorable Clinton Almond -

of election. Each political party may substitute challengers once during the voting hours, if the substitute has proper credentials from the party and subscribes to the same oath as judges of election. Challengers may keep a record of all parties voting or offering to vote. Each political party may designate and keep a challenger at the office of the board or other place of registration while registration is being carried on."

Section 117.590, RSMo 1959, which pertains to challengers and watchers in Kansas City provides:

"At every registration and election, each one of the political parties shall have the right to designate and keep a challenger at each place of registration and voting who shall be assigned such position immediately adjoining the officers in charge of registration or the election inside the polling or registration booth as will enable him to see each person as he offers to register or vote and who shall be protected in the discharge of his duty by the judges of election and the police. An authority, signed by the recognized chairman or presiding officer of the chief managing committee of a party in any such city, shall be sufficient evidence of the right of the challenger for such party to be present inside the registration or polling place. But in any case, any challenger does not or cannot produce the authority of such chairman, it shall be the duty of such judges of election to recognize a challenger that shall be vouched for and presented to them by the persons present belonging to such political party, or who shall be vouched for by the judge representing such party. The chairman of the managing committee of each political party for such city may remove any challenger appointed by him and substitute another in his place. The challenger so appointed and admitted to the room where such ballot box is kept shall have the right and privilege of remaining during the canvass of the votes and until the returns are duly signed and made. Each political party shall also have the right to a challenger placed conveniently outside of the polling booth, but not in the way of the voters. In addition to such challengers, each of

Honorable Clinton Almond -

the political parties casting votes at such polls, at the close of the polls shall have the right to the admission of two persons of their political faith into the room where such ballots are to be canvassed, to watch such canvass, which watchers may be selected as above prescribed in case of challengers; and in the absence of such selection, it shall be the duty of the judges of such election to admit into such room two persons of each political party so voting at such elections, and who shall be vouched for by judge or judges representing such political party, to be present during the canvass of such votes and the making of such returns; that such persons shall be of good character and sober, and shall in no wise interfere with such canvass. The police shall in no manner interfere with the entrance of such watchers into such room, but they shall keep order; and in case of any disorderly conduct on the part of any bystanders or watchers, it shall be the duty of the police, upon request of the judges to exclude such persons from such room, and upon such watcher or watchers being excluded from such room, the judge or judges representing the same political party as the rejected watcher may select other watchers in their stead."

Section 118.510, RSMo 1959, pertains to challengers and watchers in the City of St. Louis and provides:

"1. At every registration and election each one of the political parties named on the ballot shall have the right to designate and keep a challenger at each place of registration, revision of registration and voting who shall be assigned a position immediately adjoining the judges of election inside the polling or registration booth which will enable him to see each person as he offers to register or vote and who shall be protected in the discharge of his duty by the judges of election and the police. Authority, signed by the recognized chairman or presiding officer of the chief managing committee of such party in any such city, is sufficient evidence of the right of the challenger for the party to be present inside the registration or polling place.

If any challenger does not or cannot produce the authority of such chairman, the judges of election shall recognize a challenger who is vouched for and presented to them by the persons present belonging to such political party or who is vouched for by the judge representing such party. The chairman of the managing committee of each political party for such city may remove any challenger appointed by him and substitute another in his place.

"2. The challenger so appointed and admitted to the room where the ballot box is kept has the right and privilege of remaining during the canvass of the votes and until the returns are duly signed and made. Each political party named on the ballot shall also have the right to a challenger placed conveniently outside of the polling booth, but not in the way of the voters.

"3. In addition to the challengers, each of the political parties named on the ballot, at the close of the polls shall have the right to the admission of two persons of their political faith into the room where the ballots are to be canvassed to watch the canvass, which watchers may be selected as above prescribed in case of challengers; and in the absence of such selection, the judges of such election shall admit into such room two persons of such political party, and who are vouched for by the judges representing the political party, to be present during the canvass of votes and the making of returns; that such persons shall be of good character and sober, and shall in no wise interfere with such canvass.

"4. The police shall in no manner interfere with the entrance of watchers into such room, but they shall keep order; and in case of any disorderly conduct on the part of any bystanders or watchers, the police, upon request of the judges, shall exclude such persons from such room, and upon any watchers being excluded from the room, the judges representing the same political party as the rejected watcher may select other watchers in their stead."

Honorable Clinton Almond -

In addition, Sections 119.480, 119.500 and 119.510, RSMo 1959, applicable to Clay County election challengers and watchers, provide, respectively, as follows:

"119.480. Challenging during registration and election authorized (Clay county).--At every registration and election each of the political parties shall have the right to designate and keep a challenger during the hours of registration, revision and voting, and a watcher during the counting of the ballots in each place of registration, revision or voting, who shall be assigned such position, immediately adjoining the judges of election or registration clerks, inside the polling or registration booth as will enable him to see each person as he offers to register or vote, and who shall be protected in the discharge of his duty by the judges of election. Said challengers and watchers shall be named by the central committee of their respective parties, who shall issue in writing a certificate of appointment which shall be signed by the chairman of said committee, or, on his refusal to do so, by a majority of said committee."

"119.500. Judges to canvass vote after closing of polls (Clay county).--As soon as the poll of an election shall have been finally closed, the judges of election in their several precincts shall immediately, and at the same place of poll, proceed to canvass the vote so cast. Such canvass shall not be adjourned or postponed until it shall have been fully completed, nor until the several statements hereinafter required to be made by the judges and clerks shall have been made out and signed by them. The judges of election shall have the right to station one or more police officers, or officers of the peace, near the entrance to the room where such canvass is begun or about to take place, for the sole purpose of excluding disorderly persons and to keep the peace. The watchers of such canvass shall be allowed to be present and so near that they can see whether or not the judges and clerks of said election are faithfully performing their duties. No judges of election or police or other officer

Honorable Clinton Almond -

shall molest or remove such person during the canvass of such ballots and the certification of the result, unless he shall be personally guilty of illegal actions or disorderly conduct."

"119.510. Persons admitted to count of ballots
--number of votes to be announced (Clay county).
--No person or persons shall be admitted into the room or office where the ballots are being counted except the judges and clerks of election and such watchers as are authorized by law. It shall be the duty of one of the judges to announce to the electors present the total number of votes polled."

At first glance, therefore, it would appear that unless otherwise specifically provided by statute, a political group would not constitute a political party until it became an established political party.

We believe, however, that such an interpretation would unconstitutionally prohibit a new political party from enjoying those rights and privileges afforded by the Constitution of Missouri as well as by the Constitution of the United States. Section 118.510, with respect to the City of St. Louis was amended in 1957 to allow representatives of each one of the political parties "named on the ballot" to be admitted as watchers for the canvassing of the ballots. Section 117.590, applicable to Kansas City provides that "each of the political parties casting votes at such polls" shall have the right to watchers. Section 113.870, RSMo Supp. 1967, provides that challengers in Jackson County (outside of Kansas City) may be designated by each of the political parties. Section 119.480, (which is similar in context to Section 113.200 relating to St. Louis County), with respect to elections in Clay County, provides that at every election each of the political parties shall have the right to designate a watcher during the counting of the ballots and that such watchers shall be named by the central committee of their respective parties.

Obviously, the sections dealing with the designation of watchers and challengers at elections read in conjunction with the provisions of Section 120.170, create definite difficulties of interpretation regarding the application of some of the sections and the constitutionality of various provisions of other sections. We presume that statutes are constitutional.

Honorable Clinton Almond -

In our Opinion No. 24, dated October 22, 1954, addressed to the Honorable Michael J. Doherty, which is enclosed, we held that the St. Louis City Nonpartisan Committee was not entitled to have challengers and watchers present at polling places in the absence of a showing that it was a political party within the meaning of Sections 120.140 and 120.160. The holding of that opinion is that a political group which constituted either an established political party or a political party, under the provisions of these sections would be entitled to have challengers and watchers at the polls in the general election.

That opinion did not extend far enough to resolve the question presented in your request. However, in Preisler v. Calcaterra et al, Mo. (En Banc), 243 S. W. 2d 62 (1951), the Supreme Court of Missouri held unconstitutional a statute applicable to St. Louis City which provided that only the two dominant political parties had the right to designate and keep challengers and watchers at elections. The Court found the statute to be arbitrary and without any reasonable basis.

Since the Calcaterra decision, the Supreme Court of the United States in Glen A. Williams et al v. James A. Rhodes et al and Socialist Labor Party et al v. James A. Rhodes et al, Nos. 543 and 544, October term, 1968, 37 Law Week 4001, held that laws are unconstitutional which give the "two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate" because "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms". The Court further stated that the existence of multitudinous fragmentary groups might justify some regulatory control but presently that danger seemed only "theoretically imaginable".

We recognize that the sections above cited which relate to the formation of new political parties were enacted in 1953, subsequent to Calcaterra and prior to Williams. We find that the principles expressed in Calcaterra and Williams can be applied in the premises without emasculating the right of the state to exercise regulatory control unless such control imposes a burden on voting and associational rights in violation of the Equal Protection Clause.

It is not necessary to conclude that any of the statutes cited are unconstitutional in whole or in part since we find that a new political party organized under Section 120.140 et seq is in fact a political party within the provisions of the statutes relative to challengers and witnesses.

Honorable Clinton Almond

CONCLUSION

It is the opinion of this office that a new political party organized under the provisions of Section 120.140, RSMo et seq, is a political party within the provisions of the statutes relative to the selection of challengers and watchers.

There are no statutory provisions for challengers of political parties in areas other than Clay County, Jackson County, St. Louis County, Kansas City, and the City of St. Louis in general elections.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Enclosure: Op. No. 24,
Doherty, 10/22/54

October 24, 1968

Honorable James C. Skaggs
State Representative
District 129
Ellington, Missouri

Dear Representative Skaggs:

This office is in receipt of your request for a legal opinion upon three inquiries concerning the prosecuting attorney of a fourth class county. The first inquiry reads as follows:

"Is it legal for the Prosecuting Attorney to have his office at some other place than at the County Seat?"

Section 56.010, RSMo. Cum. Supp. 1967, provides for the election and qualifications required of prosecuting attorneys and reads as follows:

"At the general election to be held in the year A.D. 1880, and every two years thereafter, there shall be elected in each county of this state a prosecuting attorney, who shall be a person learned in the law, duly licensed to practice as an attorney at law in this state, and enrolled as such, at least twenty-one years of age, and who has been a bona fide resident of the county in which he seeks election for twelve months next preceding the date of the general election at which he is a candidate for such office and shall hold his office for two years, and until his successor is elected, commissioned and qualified; except that at the general election in 1968, and every four years thereafter, in counties of the first class not having a charter form of government, the prosecuting attorney shall be elected for a term of four years."

Honorable James C. Skaggs

The above quoted section nor any others of Chapter 56, RSMo. 1959, on prosecuting attorneys, require him to keep his office at the county seat. Consequently he may legally keep his office at any location within the county in which he was elected. Our answer to your first inquiry is in the affirmative.

Your second inquiry reads as follows:

"If the attorney moves his office out of office provided by the County Court, is the Court obligated to continue to pay the clerical help as agreed?"

Section 56.245, RSMo. Cum. Supp. 1967, is in regard to the employment and compensation of stenographic and clerical help of prosecuting attorneys of third and fourth class counties, and is of course applicable to the fourth class county of Reynolds. Said section reads as follows:

"The prosecuting attorney in counties of the third and fourth class may employ such stenographic and clerical help as may be necessary for the efficient operation of his office. The salary of any stenographer or clerk so employed shall be fixed by the prosecuting attorney with the approval of the county court to be paid by the county but such salary shall not exceed four thousand dollars per year in third class counties and one thousand eight hundred dollars per year in fourth class counties."

From Section 56.245, supra, employment of stenographic or clerical help of the prosecuting attorney of a third or fourth class county is authorized only in these instances "as may be necessary for the efficient operation of his office". Within the statutory limitation, the prosecuting attorney fixes the salary of his help, with the "approval", i.e., order of record by the county court approving the appointment, and the budgeting of sufficient funds to pay the salaries of such help. When the county court has met this legal requirement, the need for such help continues and funds for salaries are available, the county court is unauthorized to set aside its order of approval and transfer any unused balance of the budgeted salary funds to a different fund for other uses. In effect, such was the holding of this office in our opinion written for Honorable Virgil Conkling, Prosecuting Attorney of Wayne County, Missouri, on November 6, 1964, a copy of which is enclosed.

While the opinion request does not state the facts in detail, but if, as appears from what has been stated, the prosecuting attorney of Reynolds County employed stenographic and

Honorable James C. Skaggs

clerical help, fixed the salaries for same, and his action was approved by the county court of Reynolds County, by appropriate order, budgeting of salary funds, all in compliance with Section 56.245 supra, and the need for such help continues, as well as available salary funds, then the county court has the obligation to pay the prosecutor's stenographic and clerical help, regardless of the fact he has removed his office from the offices provided for his use by the court. Under these circumstances, our answer to your second inquiry is in the affirmative.

Your third inquiry reads as follows:

"Would the court be obligated to pay office rent for Prosecuting Attorney in some other town if they had provided office space in the Courthouse?"

The factual situation involved in the third inquiry has been clarified in a conversation we had with you subsequent to the date of the opinion request. Our latest information of the facts, from such conversation, is that the prosecuting attorney has recently removed his office from the rooms in the county courthouse provided for his use to a building located in the town of Ellington, in the same county. Such building was purchased by the prosecuting attorney, where he has his private law office, but proposes to charge the county the sum of \$50.00 per month for the same office space as office of the prosecuting attorney of Reynolds County.

In this connection, we call attention to our opinion of this office written for Honorable William Hoertel, Prosecuting Attorney of Phelps County, Missouri, on June 10, 1963. One of the questions discussed and answered in the opinion was whether or not the county court was legally obligated to pay \$50.00 per month to rent and equip a suitable office for the county surveyor in the basement of his home.

It was concluded in said opinion to be the duty of the county court of a third class county to furnish and equip a suitable office for the surveyor, but the court and not the surveyor determines the adequacy of the office provided under Section 49.510, RSMo. 1959.

Although the above mentioned opinion involved a third class county, the statutes referred to therein are also applicable to fourth class counties, such as Reynolds, and a copy of same is enclosed for your consideration. Applying the principles of law discussed in said opinion to the circumstances involved in the third inquiry, it is believed to be the duty of the Reynolds County Court to provide and equip adequate office space for the prosecuting attorney of that county, and this is particularly true under Section 49.510, RSMo. 1959. However, the adequacy of the office space

Honorable James C. Skaggs

and equipment to be provided at county expense is within the determination of the county court and not of the prosecuting attorney.

If the court should determine that the office space and any equipment provided for the prosecuting attorney in the county courthouse is adequate, they would be justified in refusing to pay office rent for the prosecutor's office at some other location and there would be no legal obligation on the court to make such rent payments. On the other hand, if the court were to decide the office space and equipment provided for the prosecuting attorney in the courthouse to be inadequate, and should find the new office of the prosecuting attorney to be adequate, then the court might legally pay the rent upon such new office.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Encs: Opinion No. 346, 11/5/64, Conkling
Opinion No. 101, 6/10/63, Hoertel



December 5, 1968

OPINION NO. 398
Answered by letter-Wieler

Honorable Bill Crigler
State Representative - District 118
Missouri House of Representatives
402 West Morrison
Fayette, Missouri 65248

Dear Representative Crigler:

This is in response to your request for an opinion concerning the rate of compensation to which a county collector of a third class county is entitled by reason of the collection of taxes for a levee district organized by the circuit court under Chapter 245, RSMo.

As you pointed out in your letter, there is a discrepancy between Sections 52.275, RSMo 1967 Supp. and 245.250, RSMo 1959, with regard to the rate of compensation. Section 52.275 reads:

"The county and township collectors for collecting taxes for drainage and levee districts shall receive the following amount: In counties of the second class having less than one hundred thousand inhabitants and in counties of the third class, one and one-half per cent of the amount he collects on current taxes; in counties of the third class where the collector is required by law to maintain a branch office, two and one-fourth per cent of the amount he collects on current taxes; in counties of the fourth class, two per cent of the amount he collects on current taxes; and in counties of the second class having less than one hundred thousand inhabitants and in all counties of the third

Honorable Bill Crigler

and fourth classes, two per cent of the amount he collects on delinquent drainage and levee taxes."

Section 245.250 reads:

". . . The said collector shall retain for his services one per cent of the amount he collects on current taxes and two per cent of the amount he collects on delinquent taxes."

The variance of one-half per cent between these sections in the rate of compensation for the collection of current taxes by a county collector in a third class county without a branch office was probably caused by legislative oversight during one of the frequent revisions. It is quite likely that members of the General Assembly forgot about the rate provisions being in two separate places when they raised the compensation rate in Section 52.275 (A. L. 1955 p. 368).

Since both sections refer specifically to the collection of taxes in a levee district, it is our opinion that the latest section, from the point of time, should be followed. This best expresses the legislative intent with regard to the rate of compensation. Therefore, Section 52.275, RSMo 1967 Supp. is controlling. It is our view that this is not contrary to the principle that Chapter 245 is a "code within itself," McCord v. Missouri Crooked River Backwater Levee District, 295 S.W.2d 42, 45 (Mo. 1956), because Section 52.275 as amended in 1955 refers specifically to levee tax commissions and prevails over Section 245.250 enacted in 1913, (Section 22, Laws 1913, p. 303) insofar as compensation for collection of current levee taxes is concerned.

Also, we reaffirm Attorney General's Opinion No. 28, issued to Mr. Bert Femmer on February 4, 1952 (copy enclosed). It is our feeling that this opinion still correctly expresses the construction to be given Sections 52.230, 52.240, and 52.250, RSMo 1959, with regard to drainage taxes.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

Enclosure - Op. No. 28
2-4-52, Femmer

BANKS:
TRUST COMPANIES:
SAFE DEPOSIT COMPANIES:
WAIVERS:
INHERITANCE TAXES:

It is the opinion of this office that a bank or other institution included in Section 145.210, RSMo Supp. 1967, having custody of the will of a decedent shall deliver such will to the Probate Court

which has jurisdiction of the estate. No inheritance tax waiver is required to authorize such delivery.

Opinion No. 399

November 26, 1968

Honorable William Baxter Waters
State Senator - 17th District
First National Bank Building
Liberty, Missouri



Dear Senator Waters:

We have received your letter of recent date requesting an opinion. Your request is as follows:

"Do you interpret Section 145.210 A.L. 1967, as providing that a bank may not deliver possession of a will of the deceased located in his safe deposit box without first obtaining the waiver mentioned in the section?"

We are enclosing a copy of Opinion No. 33, rendered March 17, 1954, to Mr. C. L. Gillilan which answers your opinion request. Such opinion holds on Page 5 that Section 145.210 is applicable only to the assets of the decedent. Section 145.210 quoted in such opinion was amended by Senate Bill 22 of the 74th General Assembly. However, we believe the construction placed on such section by Opinion No. 33 is applicable to the present section.

It is obvious that a will which provides for the disposition of the property of a decedent is not in itself an asset of a decedent. Since Section 145.210 applies only to assets of a decedent, there is no requirement that an inheritance tax waiver be obtained before a bank or other institution having in possession or control the will of a decedent makes delivery of such will.

Section 473.043, RSMo provides as follows:

Honorable William Baxter Waters

"After the death of a testator the person having custody of his will shall deliver it to the probate court which has jurisdiction of the estate. If the probate court is satisfactorily informed that any person has in his possession the will of any testator, and refuses to produce the same for probate, the court may summon the person, and compel him, by attachment and commitment, to produce the same."

Section 472.010(24) applicable to the Probate Code provides as follows:

"'Person' includes natural persons and corporations."

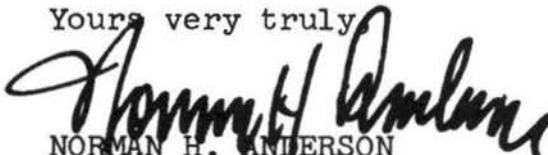
It appears therefore that corporations are included under the provisions of Section 473.043 and that banks and other corporations having custody of the wills of decedents are required to deliver such wills to the Probate Court having jurisdiction of the estate.

CONCLUSION

It is the opinion of this office that a bank or other institution included in Section 145.210, RSMo Supp. 1967, having custody of the will of a decedent shall deliver such will to the Probate Court which has jurisdiction of the estate. No inheritance tax waiver is required to authorize such delivery.

The foregoing opinion, which I hereby approve, was prepared by my assistant Daniel P. Hough, Jr.

Yours very truly


NORMAN H. ANDERSON
Attorney General

Enc.
Opinion No. 33
3/17/54 - Gillilan

ELECTIONS:
POLITICAL PARTIES:
ELECTION JUDGES:

County courts and boards of election commissioners have authority to appoint as election judges only members of the Democratic and Republican parties because such two political parties are the parties which received the largest number of votes and the next largest number of votes at the last general election. The county courts and boards of election commissioners have no authority to select judges from lists submitted to them by the alleged representatives of a third political party.

OPINION NO. 403

October 17, 1968



Honorable Kenneth W. Shrum
Prosecuting Attorney
Bollinger County
Marble Hall, Missouri 63764

Dear Mr. Shrum:

This is in answer to your letter of recent date in which you asked for the Attorney General's opinion concerning the authority and duty of the county courts and election boards to appoint election judges from a list submitted by a political party other than the two political parties which received the largest number of votes and the next largest number of votes at the preceding general election.

It is our opinion that the county courts and boards of election commissioners of this state must appoint only members of the Democratic and Republican parties as election judges because such parties received the largest number of votes and the next largest number of votes at the preceding general election.

Section 111.320 RSMo provides as follows:

"All judges of elections, appointed under the provisions of this chapter shall be selected by the county court from a list of persons furnished said court in the form and manner following: The political party that polled the largest number of votes at the last preceding general election

Honorable Kenneth W. Shrum

and the political party that polled the next largest vote at said election shall, each, through its central committee, furnish to said county court at least fifteen days before the election, a list of names of persons qualified by law to serve as judges of election, double the number required for judges of said election, from which said list said county court shall, at least ten days before the election herein provided for, select and appoint the number of judges required to hold said election, taking one-half of the judges so appointed from each of said lists; provided, that for the purpose of determining the political parties entitled to representation on the election board, the county court shall take the vote cast for governor throughout the entire state for the respective parties; provided further, that if any political party, through its committee, shall fail to present a list of names as aforesaid, within the time aforesaid, then the said county court may select and appoint the requisite number of judges provided by law for said party."

Such section is generally applicable throughout the state except in those cities and counties which come within the purview of laws specifically applicable to such counties and cities.

Similar provisions are found in Section 113.150 RSMo applicable to St. Louis County which section provides that the judges are to be selected by the board of election commissioners from lists furnished by the political party committees of the two parties which polled the largest number of votes and the next largest number of votes at the last preceding general election and further provides that if one of the parties fails to present the list within the time provided by statute or if the names presented are those of persons not entitled to vote or not qualified to be judges then the election commissioners shall select the number of judges provided by law for such party.

Section 113.650 RSMo makes similar provisions concerning that part of Jackson County outside of Kansas City. Such section provides that the judges of election shall be selected by the election board from lists submitted by the committees of the two political parties that polled the largest number of votes and the next largest number of votes at the last preceding general election and also

Honorable Kenneth W. Shrum

provides that if one of such parties fails to present a list of names within the statutory time or if the names so presented are of persons not qualified to vote or not suitable to serve as judges, the board appoints the number of judges provided by law for such party.

Section 117.090 RSMo makes similar provisions concerning Kansas City. Such section provides that the judges shall be selected from each of the two political parties polling the largest number of votes at the preceding general election.

Section 118.070 RSMo, Supp. 1967, makes similar provisions for selection of judges in St. Louis City. Such section provides that the judges shall be selected from the two political parties polling the largest number of votes at the last general election.

Section 119.200 RSMo makes similar provisions for selection of judges in Clay County. Such section provides that the judges may be selected from names submitted by the committees of the two political parties which polled the largest number of votes at the last preceding general election.

In view of these statutory provisions, it is clear that the election judges in all voting districts in the state are selected by the county courts or boards of election commissioners from members of the two political parties which at the last preceding general election polled the largest number of votes and the next largest number of votes. In this state, of course, such parties are the Democratic party and the Republican party.

In view of these clear statutory provisions, providing that the county courts and boards of election commissioners shall appoint judges who are members of the two parties receiving the largest number of votes at the preceding general election, it is clear that the county courts and boards of election commissioners have no authority to appoint judges from lists submitted by persons allegedly representing a third party.

CONCLUSION

It is the opinion of this office that county courts and boards of election commissioners have authority to appoint as election judges only members of the Democratic and Republican parties because such two political parties are the parties which received the largest number of votes and the next largest number of votes at the last general election. The county courts and

Honorable Kenneth W. Shrum

boards of election commissioners have no authority to select judges from lists submitted to them by the alleged representatives of a third political party.

The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

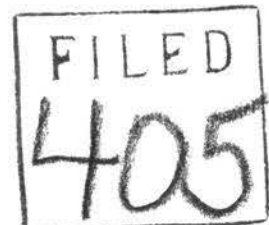
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ELECTIONS:
ABSENTEE VOTING:

An absentee ballot which is mailed to the issuing officer by an individual other than the voter at the request of the voter, is a valid ballot and should be counted if otherwise in compliance with the Absentee Voting Laws.

OPINION NO. 405

October 17, 1968



Honorable Ronald R. McKenzie
Prosecuting Attorney of Marion County
Hannibal, Missouri

Dear Mr. McKenzie:

This is in answer to your letter of recent date in which you ask for an official opinion from this office as to the validity of an absentee ballot which is mailed to the issuing officer by the officer notarizing the ballot or by some other person at the request of the voter.

Section 112.050 RSMo., 1959, provides in part as follows:

" * * * The envelope shall be sent by mail by the voter, postage prepaid, to the officer issuing the ballot, and for the ballot to be effective and eligible to be counted the envelope containing it shall bear a postmark not later than the date of the election and shall be delivered to the issuing official not later than six o'clock p.m. of the day next succeeding the day of such election, or the ballot may be delivered in person to the issuing official, who shall give his written receipt therefor, not later than six o'clock p.m. of the date of the election. * * *"

This office has ruled in opinion No. 500 issued November 3, 1966 to Honorable Fred A. Murdock, that the voter must return the ballot to the issuing officer either by mail or in person and that the ballot cannot validly be delivered to the issuing officer in person by anyone other than the voter. We are enclosing a copy of such opinion. As you will note, the holding made in such opinion was based on the fact that Section 112.050, provides that unless the ballot is sent by mail, it must be delivered "in person."

Honorable Ronald R. McKenzie

We are enclosing opinion No. 309, rendered July 8, 1966, to Honorable Donald J. Gralike, which sets forth the general law regarding agency and holds that a principal can authorize an agent to perform any act which the principal could perform except such acts as are required to be performed personally by a statutory provision or such acts as are of such a personal nature that they can be performed only in person.

There is no requirement in Section 112.050 that the mailing be done by the voter personally, and it is therefore our view that an absentee voter may authorize some other individual to mail his ballot to the issuing officer after the voter has marked such ballot and the envelope has been properly sealed and attested.

CONCLUSION

It is the opinion of this office that an absentee ballot which is mailed to the issuing officer by the voter may properly be accepted providing the absentee ballot has been executed in compliance with the Absentee Voting Law. The sealed envelope containing the ballot may be deposited in the mail for delivery to the issuing officer by the voter or by someone acting for him and at his direction.

The foregoing opinion which I hereby approve was prepared by my assistant, Mr. C. B. Burns, Jr.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Encl:
No. 309
July 8, 1966
Hon. Donald J. Gralike

No. 500
November 3, 1966
Hon. Fred A. Murdock

PODIATRISTS:
LICENSES:

It would be a valid exercise of the inherent police power of the state to adopt legislation requiring a reasonable "continuing education" program in the field of podiatry as a condition to annual registration.

Opinion No. 410-1968

December 5, 1968



Mr. Frank Fulkerson, D.S.C.
Missouri State Board of Podiatry
920 Locust Street
Chillicothe, Missouri 64601

Dear Dr. Fulkerson:

Your letter under date of October 14, 1968 concerning a continuing education program has been referred to me for attention.

You state in your letter:

"For some time, it has been the desire of the Board to introduce legislation which will require a 'continuing education' program on the part of members of our profession, for with the rapid strides in all phases of medical care, one must attend scientific meetings, seminars, post-graduate courses, etc, if he is to practice in the best interests of his patients."

Article III, Section 1 of the Missouri Constitution vests the legislative power in the "General Assembly of the State of Missouri". For sake of simplicity, we shall refer to it as "Legislature".

A major function of the Legislature is the maintenance of safety of the citizens of the state and here as such safety is related to the practice of the healing professions. The legal concept of such function is based upon the right of the state to exercise its police power. There has never been any serious doubt as to such regulatory power herein referred to as being applicable to the healing professions. See 70 C.J.S., Para. 3(a) et seq, P. 819.

The Legislature in performance of this basic function has enacted Chapter 330, RSMo. This chapter deals with "Chiropodists".

Dr. Frank Fulkerson

Section 330.030 of the statute sets out the basic requirements for the issuance of licenses and Section 330.070 sets out rules for annual registration. I am not quoting from these sections since I am certain you are familiar with their provisions.

Such regulations and requirements must bear a reasonable relationship to the particular public welfare to be safeguarded. Moreover, such regulations must not be arbitrary. These regulations must be administered and consequently the legislature has created the State Board of Chiropody or Podiatry to administer the provisions of Chapter 330.

The State Board of Podiatry must confine its rules and regulations to the area of the statutes authorizing it and can exercise only the powers the legislature has conferred upon it. State ex rel Johnson vs. Lutz, Mo., 38 SW 323; State of Missouri ex rel Hurowitz vs. North, 46 S Ct. 384. With reference to this aspect, our research led us to the case of State ex rel Inscho vs. Missouri Dental Board, 98 SW2d 606. The court stated that the State Dental Board was without power to revoke a certificate of registration because in their opinion a registered dentist failed in some phase of dentistry or in some instance or certain cases to do work commensurate with standards of skill which members of board deem proper standard of efficiency. This case is one of many and the authority is prevailing that the administrative body must stay within the bounds of its powers outlined in the statutes.

Frequently the constitutionality of decisions of administrative bodies and statutes such as Chapter 330 is challenged either on the basis of denial of due process or denial of equal protection of the law. The Supreme Court of the United States has stated:

"A statute which places all physicians in a single class and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws within the meaning of the 14th Amendment." (Emphasis added)

In the case of Gamble vs. Board of Osteopathic Examiners of California et al, 130 P 2d 382, the Supreme Court of California commented concerning a California statute which made it a requirement "of each person licensed by the Osteopathic Board to submit evidence that he completed during the preceding year a minimum of thirty hours of professional education work...."

Dr. Frank Fulkerson

The comment is as follows:

"the power to regulate the treatment of disease is an elastic one and regulation may vary according to the schools or methods of practice so long as they entail no unreasonable discrimination."

We also refer you to the case of State ex rel Week et al vs. State Board of Examiners in Chiropractic et al, 30 NW 2d 187, wherein the Supreme Court of Wisconsin stated:

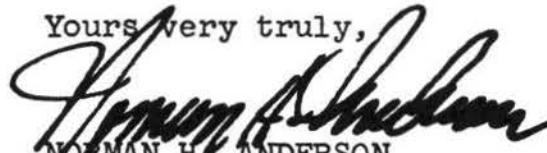
"The state has power to provide for the general welfare of its people and in so doing to prescribe reasonable qualifications to be complied with before a person may engage in or carry on any trade or profession. The fact that a person is once licensed does not create a vested property right in the licensee, as advancements in the trade or profession may require additional conditions to be complied with if the general welfare of the public is to be protected."

CONCLUSION

It would be a valid exercise of the inherent police power of the state to adopt legislation requiring a reasonable "continuing education" program in the field of podiatry as a condition to annual registration.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Daniel P. Hough, Jr.

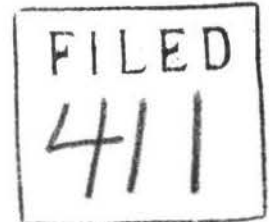
Yours very truly,


NORMAN H. ANDERSON
Attorney General

PHYSICIANS: It is the opinion of this office that the
 PODIATRY: services of a podiatrist are not "physician's
 services" as provided in Section 208.152,
 RSMo. Supp. 1967, providing for benefit payments for medical
 assistance on behalf of needy persons.

Opinion No. 411-1968

December 5, 1968



Mr. Frank Fulkerson, D.S.C.
 Missouri State Board of Podiatry
 921 Locust Street
 Chillicothe, Missouri 64601

Dear Dr. Fulkerson:

This will acknowledge receipt of your letter under date of
 October 14, 1968, wherein you requested an opinion as to the
 following. I quote from your letter,

"An opinion is requested on the status
 of the podiatrist in Missouri's 'Medic-
 aid' program (Senate Bill No. 53, 74th
 General Assembly). Section 208.152,
 paragraph (5) states: 'Physician's
 services, whether furnished in the office,
 home, hospital, nursing home or else-
 where'.

"Under a previous ruling from your office
 relative to Workmens Compensation Law, a
 chiropodist (now 'podiatrist' - terms are
 synonymous) was considered a physician
 within the limitations placed upon him
 by the statute."

Senate Bill No. 53 of the 74th General Assembly is now Sec-
 tion 208.152, RSMo. Supp. 1967, part of which reads as follows:

"Benefit payments for medical assistance
 may be made on behalf of those eligible
 needy persons who are unable to provide
 for it in whole or in part, with any
 payments to be made on the basis of the

Dr. Frank Fulkerson

reasonable cost of the care of reasonable charge for the services as defined and determined by the division of welfare unless otherwise hereinafter provided, for the following:

"(5) Physician's services, whether furnished in the office, home, hospital, nursing home or elsewhere;"

Your question is whether or not the services of a podiatrist would be "physician's services" within (5) of the preceding paragraph.

The term "physician" as such has been given a variety of definitions over the passage of time such as "one authorized to prescribe remedies for and treat diseases, one learned in the ancient art of relief of bodily ills, one lawfully engaged in the practice of medicine, one whose profession it is to prescribe and administer medicine in the treatment of disease, a doctor of medicine" and many others too numerous to mention. See C.J.S. 70, p. 813 et seq.

In the absence of statutory definition, it is readily seen that the term has a multitude of meanings. Nevertheless, it is an elementary rule of statutory construction or interpretation for one to determine the legislative intent and give effect to such intent. Nonberg vs. Montgomery, 387 SW2d 387.

We take cognizance of Section 334.021, RSMo. 1959. It reads as follows:

"Reference to terms in prior laws, how construed. -- Where other statutes of this state use the terms 'physician', 'surgeon', 'practitioner of medicine', 'practitioner of osteopathy', 'board of medical examiners', or 'board of osteopathic registration and examination', or similar terms, they shall be construed to mean physicians and surgeons licensed under this chapter or the state board of registration for the healing arts in the state of Missouri."

Our research reflects that this provision was first inserted in the laws of the state by the passage of Senate Bill No. 50, paragraph 22, 1959.

The wording seems clear that the term "physician" means only a physician licensed under the state board of registration for the

Dr. Frank Fulkerson

healing arts.

We feel that the intent of the legislature in enacting into law Senate Bill No. 50, Paragraph 22, supra, was to limit the application of the word "physician" etc. to those professions licensed under that chapter and no other chapter as such term is used in the statutes of Missouri.

We also have taken note of your comment relative to a prior opinion of this office relative to a chiropodist being "considered a physician within the limitations placed upon him by the statute" insofar as the Workmens Compensation Law is concerned.

We call your attention to the fact that Section 334.021, RSMo. 1959 was not in existence at time of this opinion rendered March 25, 1953.

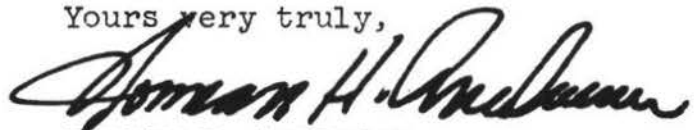
In view of Section 334.021, RSMo. 1959, we are hereby withdrawing Opinion No. 37, 3/25/52, Hansen. As pointed out above, the Legislature has specifically limited the application of the term "physician" as used in the statutes of Missouri to the categories specified in Section 334.021, RSMo.

CONCLUSION

It is the opinion of this office that the services of a podiatrist are not "physician's services" as provided in Section 208.152, RSMo. Supp. 1967, providing for benefit payments for medical assistance on behalf of needy persons.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Daniel P. Hough, Jr.

Yours very truly,



NORMAN H. ANDERSON
Attorney General

ELECTIONS:
PRESIDENT AND
VICE-PRESIDENT:
VOTING:
"WRITE-IN" VOTES:

Under Sections 111.420 and 111.580, RSMo 1959, write-in votes for president and vice-president which are properly cast must be counted, and do not invalidate a ballot nor any portion thereof.

OPINION NO. 414

October 31, 1968



Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri 65201

Dear Mr. Conley:

This is in reply to your request for an opinion as to whether a ballot is invalidated insofar as votes for presidential and vice-presidential electors are concerned, when a voter writes in names of candidates for president or vice-president.

Section 111.420, RSMo 1959, provides in part:

"1. Every ballot printed under the provisions of this chapter shall contain the names of every candidate whose nomination for any office specified on the ballot has been certified or filed according to the provisions of chapter 120, and no other names. The names of all candidates to be voted for in each election district or precinct shall be printed on one ballot; all nominations of any political party or group of petitioners being placed under the party name designated by them in their certificates of nomination or petitions, and the ballot shall contain no other names, except that in place of the names of candidates for electors of president and vice-president of any political party or group of petitioners, there shall be printed within a bracket, immediately below the circle in the column of said party, with a square to the left of such bracket, the names of the candidates of each political party for president and vice-president. The names of the candidates of the several political parties for electors of president and vice-president shall not be printed on the ballot, but shall after nomination, be filed with the secretary of state.

Honorable Frank Conley -

2. A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party by which such candidates were named and whose names have been filed with the secretary of state. The respective party state committees shall certify in writing the nominations of such presidential and vice-presidential candidates to the secretary of state at some time before the secretary of state is required by law to certify the candidates of the several political parties and groups of petitioners to the several clerks of the county court or to election commissioners. In presidential years an instruction shall be on the ballot as follows: 'A vote for names of candidates for president and vice-president is a vote for the electors of that party, the names of whom are on file with the secretary of state.'

Section 111.580, prescribing voting procedure, provides in part as follows:

"(2) If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle.

(3) Where there are two or more candidates for like office in a group, a cross (X) mark in the square to the left of a candidate's name automatically votes against the candidate whose name appears within the same horizontal lines in the column under the circle in which appears the cross (X) mark, unless the voter indicates another candidate to be voted against by drawing a line through such candidate's name."

Honorable Frank Conley -

Balloting for president and vice-president is unique among the various offices because Section 111.420 declares that "A vote for any of such candidates for president and vice-president shall be a vote for the electors of the party" (emphasis added). A vote cannot be cast for one of such candidates without voting for the other, and this vote in turn is in reality a vote for the electors representing the party which has nominated the candidates who are on the ballot, rather than a vote for the candidates themselves. The federal courts have held consistently that the matter of selecting presidential electors is up to the states. Walker v. United States, 1937, Mo., 8th Cir., 93 F. 2d 383, cert. den. 58 S.Ct. 642, 303 US 644, 82 L.Ed. 1103; Ray v. Blair, 1952, Ala., 72 S.Ct. 654, 343 US 214, 96 L.Ed. 894.

Although there are obvious difficulties in recording and counting write-in votes for candidates for president and vice-president who in reality only represent party presidential electors as provided in the United States Constitution, Article II, Section 1, Clause 2 and Amendment 12, we nevertheless feel that the mandate of Section 111.580 above quoted and cases construing it clearly allows a voter to freely express his choice in the voting booth, and does not limit a voter to the names printed on the ballot. In Kasten v. Guth, Mo. Sup. 1964, 375 S.W. 2d 110, a case involving write-in votes for a school superintendent, the Missouri Supreme Court, while not ruling specifically on the constitutionality of the election statute there involved, nevertheless referred to Missouri constitutional provisions and stated, l.c. 114:

"It is the majority rule in this nation that statutory provisions expressly stating that no person shall be voted for unless his name is printed on the ballot are unconstitutional under constitutional provisions similar to [ours] . . ."

The court also referred to Section 111.580 as quoted above, and concluded its discussion of the legality of write-ins on school elections by stating that the legislature:

" . . . intended that any elector [voter] could vote for a person of his own selection by drawing a line through the names printed on the ballot and writing in the name of his candidate. Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail. * * *"

Honorable Frank Conley -

It is therefore the opinion of this office that write-in votes for either president or vice-president do not invalidate the vote for these offices, but to the contrary must be counted by the election officials substantially in the manner prescribed by Sections 111.510, 111.660, and 111.670, RSMo 1959. While we have previously ruled in Opinion No. 345 to the Honorable Thomas O. Pickett, 10/15/64, that write-in votes must be counted and totaled without regard to party ticket, we believe that in the case of candidates for president and vice-president who actually represent their respective party presidential electors, that write-in votes must be "enumerated" for each pair of candidates as well as for the "party" under whose ticket the write-ins are made.

It is important not only to tabulate the total number of votes, including write-ins cast for a particular party slate of electors, but also to tabulate the total number of votes, including write-ins which particular presidential and vice-presidential pairs of candidates receive under each party, so that the electors can be informed of the will of the majority of the voters on their preference of candidates. Any name can, of course, conceivably be written in place of the printed name of the candidates for president or vice-president, on any of the three party tickets appearing on the 1968 Missouri ballot, "Democratic", "Republican", or "American".

As an example, and to avoid confusion on tabulating and certifying the results of votes for the three national tickets, we recommend the following procedures be used.

County clerks can certify results to the secretary of state by using the present form supplied election officials in Missouri by the secretary, Form "G". A facsimile of this form is attached to this opinion, marked Sample "A". Write-ins can be tabulated on the present form by writing the names of the other pairs of candidates under the proper party (represented by the words "WRITE-INS" on Sample "A") and drawing additional vertical lines (represented by the dotted lines on Sample "A") separating the tabulated votes of any such write-in pairs of candidates. The total number of votes for all pairs of candidates including write-in votes under a particular party, constitutes the total vote for the presidential and vice-presidential electors of that party. This total party electoral vote can be entered at the bottom of "Form G" in the regular place.

The various precinct judges and clerks can report to the county clerks in similar fashion, by inserting the names of write-in pairs of candidates in the blank spaces near the pairs printed on the forms supplied for their use, as shown by the words "WRITE-INS" on the attached form samples -- Sample "B", the actual tally sheet; Sample "C", the certification in the poll book; and Sample "D", the precinct return sheet.

Honorable Frank Conley -

Electors are then, under the language of the United States Constitution, Article II, Section 1, free to vote as they choose, although "History teaches that the electors were expected to support the party nominees" and ". . . they give their vote, or bind themselves to give it, according to the will of their constituents." Ray v. Blair, supra, 96 L.Ed. 903, and footnote 15.

CONCLUSION

It is the opinion of this office that under Sections 111.420 and 111.580, RSMo 1959, write-in votes for president or vice-president which are properly cast must be counted, and do not invalidate a ballot nor any portion thereof.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, William L. Culver.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

WLC:ss
enclosures

ms

OPINION NO. 418
Answered by Letter -- Culver

October 31, 1968

Honorable William C. Batson, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri 63901

Dear Mr. Batson:

This is in response to your inquiry concerning the question whether an entire ballot is voided when an individual votes for two candidates for the same office on different party tickets.

Section 111.580, RSMo 1959, reads in part:

"2. All candidates of the party whose circle is marked shall be counted as voted for excepting where squares are crossed preceding the names of the candidates in other columns. If two or more candidates for the same office are thus designated, neither shall be counted. If the cross (X) is not placed in the circle immediately below the party name at the head of the column, but does appear in the squares opposite the various candidate's names, then only these names shall be counted for, and none other. A cross (X) mark is any line crossing any other line at any angle within the voting space, and no ballot shall be declared void because a cross (X) mark therein is irregular in form.

* * * * *

4. A ballot placed in the ballot box without any marks shall not be counted. Ballots shall be counted only for the person for whom the marks thereon are applicable; when a voter shall place a mark against two or more names for the same office, and only one

Honorable William C. Batson, Jr.

candidate is to be chosen for the office,
none of the candidates shall be deemed to
have been voted for and the ballots shall
not be counted for either such candidate."

The primary purpose in construing election laws relating to the marking of ballots is to ascertain the voter's intention and give effect to his vote. Riefle v. Kamp, Mo. App. 1952, 241 Mo. App. 1151, 247 S.W. 2d 333. Consequently, an entire ballot should never be found void except when it is virtually impossible to determine a voter's intention on any and all candidates. Here the statutes clearly indicate that when votes are attempted to be cast for two or more names for an office for which only one candidate is to be chosen, then the vote for that particular office is void, but not the entire ballot.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

WLC/jlf

MS

Opinion No. 422
Answered by Letter-Burns

November 1, 1968

Honorable Charles B. Adams
Prosecuting Attorney of Adair County
Kirksville, Missouri

Dear Mr. Adams:

This is in answer to your letter of recent date requesting our views on the following two questions:

"1. Does the county clerk have the power to require an applicant for a Presidential ballot under the provisions of VAMS 111.063 thru .067 to produce a Missouri drivers license. If not, is there other forms of proof other than the affidavit as provided in 111.065 that he can require.

"2. Is a college student who complies with the affidavit entitled to vote under the provisions of the above statute, and if so what are the requirements for 'legal resident' provided for in the statutes."

It is our view that there is no power or authority in a county clerk to require an individual applying for a ballot under the provisions of Section 111.063 to 111.067 RSMo as amended, to produce a Missouri Driver's License.

Such Sections provide generally for a citizen of the United States who is otherwise qualified to vote and who has resided in Missouri sixty days or more but less than one year prior to the date of a presidential election, to make an affidavit stating such fact and to receive and vote a ballot for presidential and vice presidential electors only.

The affidavit made out by the applicant for such presidential ballot is as follows:

Honorable Charles B. Adams

STATE OF MISSOURI)
County of.....) ss

I, do solemnly swear that I am a citizen of the United States; that prior to establishing Missouri residence my legal residence was in the precinct of the ward of the city of, County of, state of and that I have resided at street, that I am at least twenty-one years of age; that I have been a legal resident of the state of Missouri since, 19, residing at street in the precinct of the ward of county of...; that I have resided in that precinct less than one year and pursuant to the constitution and laws of this state I am entitled to vote for president and vice-president at the election to be held November, 19; that I hereby make application for an official presidential ballot.

Signed

Subscribed and sworn to before me this day of, 19

.....
County Clerk.

It is apparent from the affidavit form that the applicant declares under oath facts that show that he has been a resident of the State of Missouri for sixty days or more and less than one year.

We can find no requirement in the affidavit form or in any statute or in any case decided in the appellate courts of Missouri that such individual is required to exhibit to the county clerk a Missouri Driver's License.

We are attaching an official opinion rendered September 28, 1938 to Honorable Charles D. Brandom which holds that residence is a matter of intention to be deduced from the actions and utterances of the person whose residence is at issue.

As pointed out in the cases cited in the opinion, a residence can be established by any individual in the State of Missouri, if it is his intention to establish such residence.

Honorable Charles B. Adams

It is our view that when the declaration under oath has been signed by an individual stating that he has been a resident of the State of Missouri more than sixty days and less than one year and his actions are and have been consistent with the facts set out in such sworn declaration that the clerk is obliged to deliver a ballot to the applicant and that the clerk cannot refuse to deliver such ballot unless the applicant produces a Missouri Driver's License. There is no requirement in Sections 111.063 to 111.067 RSMo as amended or any other statutes that an individual must be the owner of an automobile or capable of driving an automobile or the possessor of a driver's license in order to cast a vote in this State.

In answer to your second question, we are enclosing a copy of an official opinion rendered October 24, 1940 to Mr. J. W. Tucker which points out that college or university students can establish a residence in this State if it is their intention to do so, and that such intention is to be deduced from their statements and actions.

As pointed out above, the declaration under oath by such students of facts showing that they have been residents of the State for sixty days or more and less than one year, if consistent with the acts of such students, entitles such students to delivery by the clerk of a presidential ballot upon application and no requirement can be made by the clerk that such students produce Missouri Driver's Licenses.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

CBB:fb

Encl: Op. No. 11-9-28-38, Brandom

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FILED
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December 17, 1968

OPINION NO. 434

Honorable James P. Dalton
General Counsel
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Dalton:

By letter dated December 11, 1968, you requested an opinion from this office as to whether documents submitted by New Mid-America Insurance Company are in accord with Chapter 376 of the statutes and are not inconsistent with the Constitution and laws of this State and of the United States. These documents consist of the following: the Declaration of Intention of the original incorporators of the New Mid-America Insurance Company, the proposed Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo Cum. Supp. 1967, and, the Publisher's Affidavit as to publication of said Articles as required by Section 376.050, RSMo 1959.

Upon an examination of the documents referred to in the prior paragraph, as required by Section 376.070, RSMo 1959, this office finds the documents to be in accord with Chapter 376, RSMo 1959 and subsequent revisions thereof, and not inconsistent with the Constitution of this State and of the United States.

The documents are returned herewith.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

enclosures (3)



December 23, 1968

OPINION NO. 439
Answered by Letter
Klaffenbach

Honorable Harold L. Volkmer
State Representative
100th District
120 North Third Street
Hannibal, Missouri 63401

Dear Representative Volkmer:

This opinion is in response to your question concerning whether or not the State of Missouri may use land devised by the will of Sallie Rhodes Hatch in accordance with a proposal which had been made to the Missouri State Park Board to have the Hatch Farm incorporated into the Missouri State Parks System as a state park and designating that said farm is to be a historical site to be preserved as an agricultural museum in the honor of William Henry Hatch.

The documents which you furnished to us indicate that Mrs. Sallie Rhodes Hatch, by a will executed November 14, 1923, devised the property to the State of Missouri providing as follows:

"Second. I give and devise my home place, commonly known as Strawberry Hill Farm, near the City of Hannibal, and lying in Marion County, Missouri, to the State of Missouri to be used as an agricultural experimental station or such other agricultural uses as the State may care to devote the same. This bequest is made in order to perpetuate the name and memory of my beloved father, William H. Hatch, who devoted the greater part of his life to the advancement of agriculture."

After the death of the testatrix and on the 8th day of December, 1923, the Missouri Commission which was authorized by Senate

Honorable Harold L. Volkmer

Bill 575, Laws of 1915, Page 409, accepted the devise. The Acceptance stated that the Commission, which was composed of the Governor, the Attorney General and the State Treasurer:

" . . . do hereby, for and on behalf of the State of Missouri, accept the real estate so devised, for the uses and purposes Contemplated by said will."

The authority upon which the Commission acted, designated as the provisions of Section 5333, RSMo 1919, (later repealed and amended and presently Section 33.550, RSMo 1959) stated in full as follows:

"Whenever any devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real, personal or mixed, shall be made or offered to be made to this state, the governor, attorney-general and state treasurer, constituting a commission for that purpose, shall be and are hereby authorized to receive and accept the same on such terms, conditions and limitations as may be agreed upon between the grantor, donor, or assignor of said property and said officials constituting said commission, so that the right and title to shall pass to and vest in this state; and all such property so vested in this state and the proceeds thereof when collected, may be appropriated for educational purposes, or for such other purposes as the legislature may direct."

In our opinion the intended use of the property is consistent with will of the testatrix and the legislature may authorize the Missouri State Park Board to occupy and use the land for State Park purposes as a historical site preserved as an agricultural museum in the honor of William Henry Hatch.

Very truly yours,

NORMAN H. ANDERSON
ATTORNEY GENERAL

FEDERAL STATE AGREEMENTS:
STATE BOARD OF EDUCATION:
HIGHER EDUCATION ACT OF 1965:

Review and certification of State Plan
for Attracting and Qualifying Teachers
to Meet Critical Teacher Shortages under
Part B, Subpart 2 of the Education Pro-
fessions Development Act, Title V Higher Education Act of 1965, as
amended by P.L. 90-35.

December 23, 1968



Honorable Hubert Wheeler
Commissioner of Education
Department of Education
Jefferson Building
Jefferson City, Missouri 65101

Opinion Letter
No. 447-68

Dear Commissioner Wheeler:

Per your request, we have reviewed The State Plan for Attracting and Qualifying Teachers to Meet Critical Teacher Shortages under Part B, Subpart 2 of the Education Professions Development Act (Title V of the Higher Education Act of 1965 as amended by P.L. 90-35). Our review has considered the applicable federal law and the HEW draft guideline (Revised 5/1/68). We are informed that final federal guidelines and regulations are not available for us to consider in connection with this review. We have further considered Article IX, Section 2(a), Missouri Constitution, Section 161.092 and Chapter 168, RSMo Supp. 1967 and other state statutes.

We assume that a resolution of the State Board of Education has been adopted authorizing the Commissioner of Education to submit the present plan. If this has not been done, it should, of course, be immediately taken care of.

Formal citation of the Missouri Revised Statutes in the present draft of the Plan is incorrect. The Plan draft refers to the 1965 Supplement; whereas, the most current supplement is the 1967 Supplement. Statutory sections in the supplement should be referred to as "RSMo Supp. 1967". In this connection, note Paragraphs 1.3, 5.21 and 6.11(b) of the Plan.

Regarding the legal authority of the State Board of Education, Paragraph 1.3 of the Plan: The Board's authority lies in Article IX, Section 2(a) of the Missouri Constitution and Chapter 161, RSMo Supp. 1967, which has been cited. Section 168.021, RSMo Supp. may also be noted since it deals with the Board's authority to certify teachers. Sections 178.430 and 178.570, RSMo Supp. 1967, are relevant only to vocational education. They are not authority for submitting the present plan. These sections accordingly should be removed from the Plan draft.

Honorable Hubert Wheeler

We note that Paragraphs 6.1, 6.2, 6.3 and 6.5 deal with responsibilities of the Federal Commissioner of Education. These paragraphs do not appear appropriate as part of the State Plan. We note that the draft Federal Guidelines are not clear as to this section and suggest that further inquiry be made of the Office of Education as to the appropriate drafting of this section.

We direct your attention to Paragraph 6.7(a). This paragraph deals with the retention of records. As it is presently written, if the federal government failed to notify the State Department of Education that the records were no longer needed for administrative review as provided in Subparagraph (2), the Department would be obligated to retain these records forever. We assume that it is the intention of the Federal Office of Education that records not be destroyed at the end of five years which are in the process of administrative review. However, in order that the State Department might clearly know its responsibilities in the matter, we recommend that these paragraphs be clarified.

Based on the foregoing authorities and subject to the above mentioned, we hereby certify that the Missouri State Board of Education has authority under state law to submit and administer the instant program and that all the provisions of the Plan are consistent with state law.

This letter opinion constitutes our official certification of the State Plan and should be inserted in an appropriate place in each copy.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

By: Louis C. DeFco, Jr.
Assistant Attorney General

LCDJr:rs